Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "forum defendant rule," a civil action commenced in state court that meets the requirements of federal diversity jurisdiction may be removed to federal district court if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The question presented is:

Whether the Eighth Circuit was correct to hold, in conflict with other circuits, that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand, rather than a defect "other than lack of subject matter jurisdiction" that is waived if not raised in a timely motion to remand the case.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Eighth Circuit were Petitioner Steven T. Waugh, who is a defendant in the court below; Thomas A. Horton, who is the plaintiff in the court below; and Respondents Katherine A. Conklin, Norman S. Redhead, Stephen W. Templar, Church of the Holy Cross Episcopal, National Epileptic Foundation, St. Philips Episcopal Church and Outreach, Alison Horton Waldrip, Caring Friends of Denver, Lee Graber, Sylvia Graber, and Steven Asay, defendants in the court below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. The Decision Of The Eighth Circuit Conflicts With Decisions Of Seven Other Circuits. 9

A. The Overwhelming Majority Of Circuits Hold That The Forum Defendant Rule Is Not Jurisdictional. 10

B. The Eighth Circuit Stands Alone In Holding That A Violation The Forum Defendant Rule Defeats Federal Jurisdiction Over Cases Removed From State Court 14

II. The Forum Defendant Rule Is Not A Requirement Of Federal Jurisdiction 16

III. The Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Of The Case 18

IV. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Page(s)

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6 (1951) 17
Bailey v. *Texas Co.*, 47 F.2d 153 (2d Cir. 1931) 13
Beneficial Nat'l Bank v. *Anderson*, 539 U.S. 1 (2003) 3
Breuer v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) 3
Farm Construction Services, Inc. v. *Fudge*, 831 F.2d 18 (1st Cir. 1987) 12
Grubbs v. *General Elec. Credit Corp.*, 05 U.S. 699 (1972) 12, 15
Handley-Mack Co. v. *Godchaux Sugar Co.*, 2 F.2d 435 (6th Cir. 1924) 13
Hurley v. *Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000) 9, 10
Hurt v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992) 8, 14, 15, 18
In re Allstate Ins. Co., 8 F.3d 219 (5th Cir. 1993) 19
In re Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) 11, 12
Korea Exchange Bank v. *Trackwise Sales Corp.*, 66 F.3d 46 (3d Cir. 1995) 9, 10, 11, 16
Lincoln Prop. Co. v. *Roche*, 126 S. Ct. 606 (2005) 3, 4
Loftis v. *UPS*, 342 F.3d 509 (6th Cir. 2003) 18, 19
Mackay v. *Uinta Dev. Co.*, 229 U.S. 173 (1913) 16
Nolan v. *Prime Tanning Co.*, 871 F.2d 76 (8th Cir. 1989) 18
Payne v. *Brake*, 439 F.3d 198 (4th Cir. 2006) 18
Rivet v. *Regions Bank*, 522 U.S. 470 (1998) 3

Snapper, Inc. v. *Redan*,
171 F.3d 1249 (11th Cir. 1999) 13, 14, 17
Syngenta Crop Prot., Inc. v. *Henson*,
537 U.S. 28 (2002) 3
Things Remembered, Inc. v. *Petrarca*,
516 U.S. 124 (1995) 4, 7
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 20
Velchez v. *Carnival Corp.*,
331 F.3d 1207 (11th Cir. 2003) 19
Wisconsin Dep't of Corr. v. *Schacht*,
524 U.S. 381 (1998) 3
Woodward v. *Overmyer Co.*,
428 F.2d 880 (2d Cir. 1970) 12, 13

STATUTES

28 U.S.C. § 1332 2
28 U.S.C. § 1441 ..... 1, 3, 16
28 U.S.C. § 1447 ..... 1, 2, 4, 8, 19

OTHER

James William Moore,
Moore's Federal Practice 3d (2006) 9, 16, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in conflict with other federal courts of appeals, held that that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand. Each of the seven other circuits that has decided the question has held that the "forum defendant rule" is nonjurisdictional, and thus may be waived if the adverse party fails to file a timely motion for remand under 28 U.S.C. § 1447(c). Certiorari should be granted to resolve the persistent split in the circuits on this important jurisdictional question.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 431 F.3d 602. The district court's order, App., *infra*, 9a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005. App., *infra*, 1a. A petition for rehearing en banc was denied on February 9, 2006. App., *infra*, 8a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1441(b) of title 28 provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be

> removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b).

Section 1332 of title 28 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> * * *

28 U.S.C. § 1332.

Section 1447 of title 28 provides, in pertinent part:

> Procedure after removal generally
>
> * * *
>
> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
>
> * * *
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed

pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided. The "forum defendant rule" of 28 U.S.C. 1441(b) provides that no defendant in a non-federal question case removed from state court may be a resident of the state in which the action was brought. The circuits have split over whether the forum defendant rule is a jurisdictional requirement of removal or a non-jurisdictional requirement that may be waived by the adverse party.[1]

1. The "Forum Defendant Rule." Section 1441 of title 28 sets forth the general rule for removal to a federal court of cases originally brought in a state court: "[A]ny civil action brought in a State court" may be removed if "the district courts of the United States have original jurisdiction" over the case. 28 U.S.C. § 1441(a). Cases based on a federal question are "removable without regard to the citizenship or residence of the parties." *Id.* § 1441(b). All other cases are removable "only if none of the parties in interest properly joined and served as

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[1] The Court regularly grants petitions for certiorari to resolve conflicts among the circuits over the scope of federal removal jurisdiction. *E.g.*, *Lincoln Prop. Co.* v. *Roche*, 126 S. Ct. 606, 612 (2005); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003); *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 31 (2002); *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 385 (1998); *Rivet* v. *Regions Bank*, 522 U.S. 470, 474 (1998).

defendants is a citizen of the State in which such action is brought." *Id.*

This Court recently noted that "several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a 'procedural' defect, not a 'jurisdictional' bar, and that the defect is waived if not timely raised by the plaintiff." *Lincoln Prop. Co.* v. *Roche*, 126 S. Ct. 606, 613 n.6 (2005).

2. Remand To State Court And Appellate Review. After a case is removed to federal court, a remand to the state court is appropriate in two circumstances. First, the case must be remanded "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). Second, a case may be remanded "on the basis of any defect other than lack of subject matter jurisdiction," but a motion to remand for a reason other than lack of subject matter jurisdiction "must be made within 30 days after the filing of the notice of removal." *Id.*

Section 1447(d) of title 28 provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This Court has held that this provision must "be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review." *Things Remembered, Inc.* v. *Petrarca*, , 127 (1995). A district court's remand order thus is reviewable on appeal unless it is "based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction." *Id.*

In this case, Respondent did not move to remand the case to state court. Consequently, the remand order was proper and unreviewable only if a violation of the forum defendant rule is a requirement of federal subject-matter jurisdiction, rather than a nonjurisdictional defect.

3. Factual Background. Petitioner Steven Waugh was named as a beneficiary of a trust created by his mother and stepfather, Peggy and Stephen Horton, on February 28, 1997. As originally drafted, the trust became irrevocable upon death of one of the trustors. The trustors made several handwritten changes to the trust document between 1997 and 2003, but did not modify the irrevocability provisions. After the trust was executed, Petitioner's mother was diagnosed with Alzheimer's Disease. On June 2, 2003, the trustors executed an amendment that removed restrictions that the trust had imposed on the surviving spouse. The June 2, 2003 amendment also listed the Hemlock Society, an entity that advocates assisted suicide, as an organization that the surviving spouse should consider in distributing the assets of the trust. Petitioner's mother died one day after executing the amendment, and was cremated one day after she died.

A little more than one year later, Petitioner's stepfather, Stephen Horton, the surviving trustor, prepared a final "Letter of Instruction." The letter, dated September 15, 2004, designated Respondent, Stephen Horton's cousin, as the trustee and main beneficiary of the trust. The instruction also specified a gift of $20,000 to "Caring Friends of Denver" (another name for the Hemlock Society), and instructed that the gift should be accompanied by a card reading, "Thank You," and including the dates of both trustors' deaths. The final instruction left nothing to Petitioner. Petitioner's stepfather died two days later and was cremated within three days.

4. The District Court's Order. One week after Stephen Horton's death, Respondent brought a petition to construe the trust in Missouri state court. App., *infra*, 2a. The petition asked the court to declare the validity of the final instruction. Respondent named twelve defendants,

including Petitioner, his sister, nine additional parties who had at one time or another been designated as beneficiaries of the trust, and an individual who was a financial advisor to the trustors. *Id.* & n.2. Respondent is a citizen of Maine; all of the defendants were citizens of other states. *Id.* at 2a.[2]

Petitioner filed a timely Notice of Removal based on diversity of citizenship. *Id.* The Notice of Removal was deficient in two respects. First, it was not joined by any of the other defendants. Second, three of the named defendants appeared to be citizens of Missouri, where the original case had been filed. *Id.* Respondent did not, however, move to remand the case to state court because of either deficiency. *Id.* To the contrary, Respondent filed an answer to Petitioner's counterclaim, in which he requested that the court "proceed to adjudication" on the merits.

The possibility of a remand was raised by the district court *sua sponte*. The court issued an order raising the possibility that it "may not have jurisdiction to hear this case." *Id.* The court noted that because three defendants appeared to be citizens of Missouri, the court

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[2] The Eighth Circuit's opinion incorrectly states that the district court "remanded the case to Missouri state courts due to a lack of complete diversity." App. *infra*, 3a. It is undisputed that complete diversity exists between Respondent, a citizen of Maine, and all defendants to the state proceeding, who are citizens of Arizona, California, Colorado, Maryland, Missouri, Texas, Utah, or Washington. In addition, the amount in controversy exceeds the $75,000 jurisdictional requirement of 28 U.S.C. § 1332(a): According to Stephen Horton's final instruction letter, the trust contained assets in excess of $800,000, including $500,000 in life insurance. *See* Mot. of Appellee to Expedite Review (noting $500,000 life insurance policies).

might not have jurisdiction under Eighth Circuit precedent holding that the "forum defendant rule" is jurisdictional in nature. The court directed Respondent to file a brief stating whether any of the Missouri defendants had been served. The court reasoned that "[i]f these defendants [had] been served in the state court proceedings, removal would be improper and [the district court] would not have jurisdiction." App. *infra*, 10a. In response, Respondent filed a brief stating that the Missouri defendants had been served by certified mail, and included copies of the return receipts of those mailings.[3] *Id.* Respondent did not, however, move that the case be remanded to state court.

Petitioner replied to Respondent's brief, arguing that the other defendants had not responded to the original complaint and should be dismissed. The district court denied Petitioner's motion to dismiss and *sua sponte* remanded the case to the Missouri state court because of the violation of the forum defendant rule. *Id.* at 12a.

5. The Eighth Circuit's Decision. The Eighth Circuit held that it lacked jurisdiction to hear Petitioner's appeal of the district court's remand order. App., *infra*, 5a. The court based its decision on Eighth Circuit precedent holding that a violation of the forum defendant rule is jurisdictional. *Id.* at 3a-4a.

The court of appeals first noted that 28 U.S.C. § 1447(d) forbids appellate review only of remand orders "based on grounds specified in § 1447(c)." *Id.* at 4a, quoting *Things Remembered*, 516 U.S. at 127. The court

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[3] Missouri law requires that service of process on in-state parties may be made by mail only if personal service cannot be made. Mo. R. Civ. P. 54.12(b). Here, all of the Missouri defendants were in the same county as Respondent's counsel, and no explanation was offered for the lack of personal service.

therefore concluded that it "lacks jurisdiction to review remand orders that are based on procedural defects brought within thirty days or jurisdictional defects raised at any time before final judgment is entered." *Id.*[4]

Petitioner argued that the presence of a defendant in the forum state constituted a defect other than lack of subject matter jurisdiction, and that Respondent's failure to move for remand constituted a waiver of his right to remand. *Id.* The Eighth Circuit disagreed. The court relied on its prior decision holding that "violation of the forum defendant rule is a jurisdictional defect." *Id.* at 4a, citing *Hurt* v. *Dow Chem. Co.*, 963 F.2d 1142, 1146 (8th Cir. 1992). The court acknowledged that "other circuits have held to the contrary that the violation of the forum defendant rule is a procedural, nonjurisdictional defect," but concluded that "*Hurt* sets forth the better rule." *Id.* at 4a. The court thus held that Petitioner's "violation of the forum defendant rule constituted a jurisdictional defect," and that it consequently lacked jurisdiction to review the district court's order. *Id.* at 4a-5a.

The court of appeals suggested that there were two additional grounds for remanding the case. First, the court noted that Petitioner had violated the "rule of unanimity" by failing to join all defendants in the notice of removal, and stated that this violation "appears to be dispositive." *Id.* at 3a. Second, the court stated that Respondent "demonstrated, per the district court's order,

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[4] In listing the grounds upon which remand is permissible, the court quoted a superseded version of § 1447(c). Section 1447(c) now permits remand based on: (1) a motion to remand "on the basis of any defect other than lack of subject matter jurisdiction" made within 30 days after the filing of the notice of removal; or (2) if "it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447.

that Missouri defendants had been served within the thirty day window [that Respondent] had to file a remand motion." *Id.* at 5a n.3. The court of appeals concluded that "even if this case had been reviewed under the rule that the forum defendant rule is nonjurisdictional, [Petitioner] could not have prevailed, as [Respondent's] compliance with the district court's order arguably obviated the need to file a motion to remand." *Id.*[5]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Conflicts With Decisions Of Seven Other Circuits.

The Eighth Circuit's opinion in this case recognizes the existence of a split in the circuits on whether the forum defendant rule in diversity cases removed from state courts is a jurisdictional requirement or a defect other than subject matter jurisdiction that may be waived. App., *infra*, 4a, 7a. Other courts and scholars have also noted this split. *E.g.*, *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 379 (7th Cir. 2000); *Korea Exch. Bank* v. *Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995); 16 Moore's Federal Practice § 107.14[2][e][ii] ("The courts are split on whether the ban on local defendants is procedural or jurisdictional."). The persistent circuit split on an important issue of federal subject-matter jurisdiction warrants review by this Court.

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[5] The court went on to reject Petitioner's appeal from the district court's denial of his motion to dismiss the other defendants in the case, and to deny Respondent's motion for sanctions. *Id.* at 5a-7a.

A. The Overwhelming Majority Of Circuits Hold That The Forum Defendant Rule Is Not Jurisdictional.

Six circuits have held that the presence of a defendant in the forum state does not preclude federal jurisdiction over a case removed from state court. One additional circuit has stated that its interpretation of § 1447(c) leads to the same conclusion.

In *Hurley* v. *Motor Coach Industries, Inc.*, the Seventh Circuit considered whether a defendant in the forum state precluded federal jurisdiction over a personal injury case removed from state court. 222 F.3d 377 (7th Cir. 2000). In *Hurley*, as here, the state-court plaintiff did not file a motion to remand, even though a defendant was a citizen of the forum state. *Id.* at 378-79. The defendant argued that the plaintiff's failure to move for remand waived any objection to removal. *Id.* at 379. The court noted that "waiver is possible only if the forum defendant rule is nonjurisdictional." *Id.*

The court noted that "[t]he overwhelming weight of authority" favors the position that the forum defendant rule is nonjurisdictional, *id.* (collecting cases), and it concluded that "the majority rule is the correct one." *Id.* The court reasoned that where, as here, "the case as it arrived in federal court met every requirement for federal jurisdiction," but "took the wrong path, in a sense, because there was an in-state defendant," the defect "is more a matter of removal procedure, and hence waivable, than a matter of jurisdiction." *Id.* at 380.

The court also noted that the policy behind the forum defendant rule supports its characterization as nonjurisdictional. "The rule is designed to preserve the plaintiff's choice of a (state) forum, under circumstances where it is arguably less urgent to provide a federal forum to prevent prejudice against an out-of-state party." *Id.*

According to the court, "the only purpose that would be served by declaring the forum defendant rule jurisdictional would be to preserve for plaintiffs rights that the plaintiffs themselves failed to assert." *Id.* The court thus elected to "join the longstanding line of authority that holds that the forum defendant rule is nonjurisdictional." *Id.*

The Third Circuit likewise has held that the presence of a forum defendant is nonjurisdictional and waivable. In *Korea Exchange Bank* v. *Trackwise Sales Corp.*, a New York plaintiff filed a complaint against three New Jersey defendants in New Jersey state court. 66 F.3d 46, 47 (3d Cir. 1993). More than 30 days after the complaint was served on the first defendant, it removed the case to federal court. *Id.* The other two defendants were served after the notice of removal, and did not join in the notice of removal. The district court noted that the defendants were citizens of New Jersey and remanded the case *sua sponte* to state court. *Id.*

The Third Circuit treated the appeal as a writ of mandamus and ordered the district court to vacate its remand order. *Id.* at 51-52. The court held that there was no dispute that "the action was not removable" because of the New Jersey defendants, and proceeded to examine whether this constituted "a 'jurisdictional' defect, which would bar . . . jurisdiction to review, or whether it was a 'procedural' defect," which is reviewable. *Id.* at 48. The Third Circuit examined a series of this Court's cases, in which the Court "consistently refused to treat the removal statute as imposing independent jurisdictional requirements." *Id.* at 49. The court concluded "that section 1441(b)'s bar against removal by a forum-state citizen is not jurisdictional." *Id.* at 50. The court noted that its conclusion "is consistent with the conclusions reached by almost every other court of appeals that has addressed the issue," and that the position "is endorsed by

several leading commentators." *Id.* (collecting authorities).

The Fifth Circuit has also held that a violation of the forum defendant rule did not strip the district court of jurisdiction. *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), was originally filed in Texas state court and was timely removed to federal court. *Id.* at 1519. As here, two defendants were residents of the forum state. *Id.* The plaintiffs moved to remand because of the two forum defendants, but their motion was filed more than 30 days after the notice of removal. *Id.* Nevertheless, the district court granted the motion and remanded the case to the Texas court. *Id.* The defendants then petitioned the Fifth Circuit for mandamus to compel the district court to recall its remand order. *Id.*

The appellate court noted that "[a]lthough the defendants were citizens of the forum state, the district court still had subject matter jurisdiction because complete diversity existed." *Id.* at 1519. The court, writing prior to this Court's decision in *Things Remembered*, held that it had jurisdiction because the remand order was based on "a 'defect in removal procedure,'" that was not timely raised, "not on lack of subject matter jurisdiction." *Id.* at 1520-21 & n.4. The court reviewed the legislative history of § 1447 and the scholarly commentary, noting that the authorities were in agreement that the presence of a forum defendant constitutes "non-removability of a proceeding otherwise within federal jurisdiction." *Id.* at 1521-22. The court concluded that because that condition exists at the time of removal, it is a nonjurisdictional "defect in the removal procedure." *Id.* at 1522.

The First Circuit has also adopted the majority rule. In *Farm Construction Services, Inc.* v. *Fudge*, 831 F.2d 18 (1st Cir. 1987), the plaintiff appealed after an adverse judgment, charging that the case should be

remanded because of the presence of a forum-state defendant. The court agreed with the plaintiff that "the initial removal of this action was improper," but held that by failing to object to removal, the plaintiff waived his right to remand. *Id.* at 21-22. The court held that "[w]here the removal was improper only for technical reasons, the issue on appeal 'is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.'" *Id.* at 22, quoting *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972).

The Second and Sixth Circuits have also long held that the presence of a defendant in the forum state does not preclude federal jurisdiction over a removed case. In *Woodward* v. *Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970), the Second Circuit confronted a case that was removed from New York state court, where a defendant was a New York corporation. "While the action should therefore have been remanded if the plaintiffs had moved for such relief, no suggestion on this score was made until [defendants] brought the point to [the court's] attention." *Id.* at 882 Judge Henry Friendly, writing for the panel, reviewed the existing precedent, which at the time was uniform. *Id.* He cited the Sixth Circuit's decision in *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435 (6th Cir. 1924). 428 F.2d at 882. In that case, the Sixth Circuit held that where there was complete diversity in a removed case but also a forum-state defendant, if there was "no timely request for remand, the situation could be considered to be as if the plaintiff had brought the action in the federal court," and "objection on the score of nonremovability would be deemed waived." *Id.*

Judge Friendly noted that Judge Learned Hand had followed the Sixth Circuit's *Handley-Mack* decision in *Bailey* v. *Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931). Judge Hand found the *Handley-Mack* decision to be

"conclusive." 428 F.2d at 882, quoting *Bailey*, 47 F.2d at 155. Given the precedent holding that a violation of the forum defendant rule was nonjurisdictional, the panel and Judge Friendly were "quite content to follow our distinguished predecessors." 428 F.2d at 882-83.

The Eleventh Circuit has indicated its agreement with the six circuits that have directly held that the forum defendant rule is nonjurisdictional. In *Snapper, Inc.* v. *Redan*, 171 F.3d 1249 (11th Cir. 1999), the court examined the history of § 1447 in the context of determining whether that section permitted review of a remand order based on a forum selection clause. In the course of its analysis, the court noted the circuit split over whether a violation of the forum defendant rule is a "defect other than lack of subject matter jurisdiction" under § 1447. *See id.* at 1257-58. The court noted that the 1996 revision of the statute "would seem to address neatly the issue that had concerned courts under the 1988 version, suggesting that a removal in violation of 1441(b) is subject to the 30-day time limit." *Id.* at 1258. Under the Eleventh Circuit's interpretation of the statutory language, a violation of the forum defendant rule would be a "defect other than lack of subject matter jurisdiction" under § 1447(c). *See id.*

B. The Eighth Circuit Stands Alone In Holding That A Violation The Forum Defendant Rule Defeats Federal Jurisdiction Over Cases Removed From State Court.

The Eighth Circuit is the only circuit to have adopted the contrary rule that the presence of any defendant in the forum state divests the district court of subject matter jurisdiction it would otherwise have over a case removed from state court. The court originally took this position in *Hurt* v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992). *Hurt* was a personal injury case that was

removed from state court on the basis of federal question jurisdiction under the Federal Insecticide Fungicide and Rodenticide Act. *Id.* at 1143. Nearly a year after the notice of removal, the plaintiff moved to remand, asserting that removal based on a federal question was improper. *See id.* at 1143-44. The district court held that the removal was proper, and any nonjurisdictional objection to removal had been waived. *Id.* at 1144.

On appeal, the court first determined that the action was not removable on federal question grounds, and then considered whether "the fact that the District Court would have had diversity jurisdiction" cured the impropriety. *Id.* at 1145. The court noted that the case would not have been removable because one defendant was a citizen of the original forum state. *Id.* at 1145. The court held that the presence of a forum-state defendant creates "an absence of subject-matter jurisdiction" that "cannot be waived." *Id.* at 1146 n.1.

The *Hurt* court relied primarily on this Court's decision in *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699 (1972). In *Grubbs*, the United States had been interpleaded as a party to an existing case and had removed the action to federal court. 405 U.S. at 701. No party objected to federal jurisdiction. *Id.* After trial and judgment, the Fifth Circuit on its own initiative determined that there had never been federal jurisdiction and remanded the case to state court. *Id.* at 702. This Court reversed, holding that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* The Court determined that there had been diversity jurisdiction and remanded the

case to the court of appeals for consideration on the merits. *Id.* at 704, 706.

The Eighth Circuit in *Hurt* held that *Grubbs* "expressly relied on the fact that the plaintiff had never objected to removal in the district court." 963 F.2d at 1146. In *Hurt,* however, "the plaintiff did object to the removal in the District Court." *Id.* The court thus held that *Grubbs* did not apply and the district court lacked jurisdiction. *Id.*

In the instant case, the Eighth Circuit reaffirmed its holding in *Hurt.* The court acknowledged that there was contrary authority from other circuits, but concluded that "*Hurt* sets forth the better rule," and that "the violation of the forum defendant rule is a jurisdictional defect." App., *infra,* 4a. Given the opportunity to reconsider *Hurt* en banc, the Eighth Circuit declined. App., *infra,* 8a.

II. The Forum Defendant Rule Is Not A Requirement Of Federal Jurisdiction.

The judges who have concluded that the forum defendant rule is nonjurisdictional (including, among others, Learned Hand and Henry Friendly) have given persuasive reasons for doing so.

First, the text of § 1441 indicates that the forum defendant rule is not jurisdictional. The section begins by stating that a "civil action of which the district courts have original jurisdiction founded on [a federal question] shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). It goes on to state that "[a]ny *other such action*" is subject to the forum defendant rule. *Id.* (emphasis added). The rule thus specifically applies only to "civil action[s] of which the district courts have original jurisdiction." *Id.* If the forum defendant rule were jurisdictional, the second sentence of § 1441(b) would lead to the anomaly that the

district court is required to have jurisdiction over a particular case as a prerequisite to stating that jurisdiction is lacking.

Second, this Court's decisions have "consistently refused to treat the removal statute as imposing independent jurisdictional requirements." *Korea Exch. Bank*, 66 F.3d at 49. The Court has recognized a distinction between the removal "process" and restrictions on subject matter jurisdiction in the federal courts. *Id.*, citing *Mackay* v. *Uinta Dev. Co.*, 229 U.S. 173, 176 (1913) (finding jurisdiction over case even though improperly removed).

Third, as Professor Moore explains, "[t]he policy behind the forum-defendant rule supports the nonjurisdictional characterization." 16 Moore's Federal Practice § 107.14[2][e][ii]. An original function of the federal court system is to provide a forum where out-of-state defendants could expect a hearing free of any local prejudice. The forum defendant rule is consistent with this policy and with the policy that the plaintiff chooses the forum. It allows an out-of-state plaintiff to choose a state forum when a federal forum is available. The plaintiff may preserve his choice by moving to remand if the defendant removes the case to federal court. If the plaintiff decides that he prefers the federal forum and does not object, holding that the forum defendant rule is jurisdictional would defeat that preference. The rule is designed to preserve the plaintiff's choice of forum; holding the rule to be jurisdictional preserves only a right that the plaintiff has chosen not to assert. *Id.*

The Eighth Circuit's contrary decision that the presence of an in-state defendant destroys subject-matter jurisdiction is unpersuasive. In *Hurt* the court simply asserted that this Court's decision in *Grubbs* was distinguishable because, unlike the plaintiff in *Grubbs*, the *Hurt* plaintiff had objected to removal. This is wrong

for two reasons: First, it is axiomatic that a party may not waive lack of subject matter jurisdiction. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 18 (1951) ("It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.") The plaintiff's objection to removal is thus immaterial to the question of whether the court has subject matter jurisdiction, and *a fortiori* is immaterial to whether a particular condition of removal is or is not jurisdictional. Second, at the time of the events in *Hurt*, § 1447(c) provided (as it does now) a 30-day time limit for nonjurisdictional defects "in the removal process," but no time limit for lack of jurisdiction. *Snapper*, 171 F.3d at 1256 (quoting 1988 version). The *Hurt* plaintiff objected to removal more than a year after the notice of removal. 963 F.2d at 1143. To the extent her objection was for a nonjurisdictional defect it was untimely; to the extent it was jurisdictional, no objection was necessary. *Hurt* thus fails to articulate any persuasive reason that the forum defendant rule is jurisdictional.

III. The Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Of The Case.

The Eighth Circuit's holding that it lacked jurisdiction was dispositive of the case. Had the court held that the forum defendant rule is nonjurisdictional, it would have found that it had jurisdiction to hear the appeal, and would have been obliged to reverse the district court's remand order. Although the court suggested that there were additional grounds for remanding the case, those suggestions are plainly incorrect.

First, the court of appeals noted that Petitioner's notice of removal was deficient for violating the "rule of unanimity," which requires that all defendants join the

notice of removal. App., *infra*, 3a. The court stated that this defect "appears to be dispositive." *Id.* That is incorrect. The courts of appeal are in agreement that the "rule of unanimity" is a defect in the removal procedure, which must be raised by motion within 30 days of the notice of removal. *See, e.g., Payne* v. *Brake*, 439 F.3d 198, 203 (4th Cir. 2006) ("Failure of all defendants to join in the removal petition does not implicate the court's subject matter jurisdiction. Rather, it is merely an error in the removal process.") (also collecting cases); *Loftis* v. *UPS*, 342 F.3d 509, 516-17 (6th Cir. 2003) (breach of the rule of unanimity is a "technical defect[] in the removal procedure" that "must be raised by a party within thirty days of removal" or else be "waived"). Indeed, the Eighth Circuit itself has held that failure of all defendants to join in removal is "not jurisdictional," and "a party may waive the right to object to removal on these grounds." *Nolan* v. *Prime Tanning Co.*, 871 F.2d 76, 78 (8th Cir. 1989); *see also Hurt*, 963 F.2d at 1146 n.1 (failure of a defendant to join the removal petition "was procedural."). Respondent waived his right to a remand based on the rule of unanimity by failing to move for remand within 30 days.

Second, the court stated that "even if this case had been reviewed under the rule that the forum defendant rule is nonjurisdictional, [Petitioner] could not have prevailed." App., *infra*, at 5a n.3. The court reasoned that Respondent filed his brief in response to the district court's order within the 30-day window for filing a motion to remand, and that this "arguably obviated the need to file a motion to remand." *Id.* This is also incorrect.

Respondent's brief recited only the facts concerning service upon the in-state defendants; it did not request remand. Section 1447 is clear that a defect other than lack of subject matter jurisdiction must be raised by a "motion to remand the case." 28 U.S.C. § 1447(c). Accordingly, the courts of appeals agree that a district

court may not *sua sponte* remand a case based on a defect in the removal process. *E.g.*, *Loftis*, 342 F.3d at 516-17 ("[T]echnical defects in the removal procedure . . . may not be raised *sua sponte*."); *Velchez* v. *Carnival Corp.*, 331 F.3d 1207, 1209 (11th Cir. 2003); *In re Allstate Ins. Co.*, 8 F.3d 219, 223 (5th Cir. 1993) ("[W]e can discern no basis, in either the language of the amended statute or in policy, for conferring upon the district courts discretion *sua sponte* to remand for purely procedural defects."). These courts have recognized that a plaintiff has the "ability to acquiesce in a procedural problem," and that "[a]llowing district courts to remand cases on their own because of procedural defects" could "depriv[e] both sides of their preferred forum." *Velchez*, 331 F.3d at 1209. In this case, Respondent not only refrained from filing a motion to remand, but filed an answer affirmatively urging the federal court to "proceed to adjudication." Pl.'s Reply & Answer at 3.

IV. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals

This Court has recognized that "[t]he distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics." *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988). This Court frequently has granted review in cases presenting questions concerning the subject-matter jurisdiction of federal courts, in order to ensure that the scope of federal jurisdiction is uniform throughout the United States. *See* note 1 *supra* (collecting cases).

No fewer than eight circuits have opined on whether the presence of an in-state defendant is a jurisdictional defect in removal, or whether it is instead a waivable defect other than lack of subject matter jurisdiction. In the more than 80 years since the question

first arose, the courts have examined the plain text and legislative history of the relevant statute as it evolved, the policy behind the forum defendant rule, this Court's jurisprudence, and the scholarly commentary. One circuit—the Eighth—has chosen to depart from the line of cases holding that the forum defendant rule is not a separate requirement of federal jurisdiction. Having reaffirmed its decision in *Hurt* in the instant case and declined to hear the case en banc, the Eighth Circuit is unlikely to restore the uniformity of the federal law. Absent a decision from this Court, the circuit split on an issue of the subject-matter jurisdiction of federal courts is likely to persist.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2006

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1199

Thomas A. Horton, *Plaintiff-Appellee*,

v.

Katherine A. Conklin; Norman S. Redhead; Stephen W. Templar; *Defendants*,

Steven T. Waugh; *Defendant-Appellant*,

Church of the Holy Cross Episcopal; National Epileptic Foundation; St. Philips Episcopal Church and Outreach; Alison Horton Waldrip; Caring Friends of Denver; Lee Graber; Sylvia Graber; Steven Asay, *Defendants*.

Appeal from the United States District Court for the Western District of Missouri.

October 13, 2005, Submitted
December 8, 2005, Filed

Before LOKEN, Chief Judge, LAY, and BENTON, Circuit Judges.

LAY, Circuit Judge.

Steven Waugh appeals the decision of the district court[1] remanding this case to state court for lack of federal subject matter jurisdiction and denying Waugh's motion to dismiss other defendants. We affirm.

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[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri

I.

Thomas Horton, a citizen of Maine, brought a petition to construe a trust in the circuit court of Grundy County, Missouri. Horton named twelve defendants. Three of the named defendants reside in Missouri and were served in Missouri. The other nine defendants reside in other states. The trust in question was created by a married couple, as co-trustees, to dispose of their assets upon their deaths. Horton and eleven of the twelve defendants are beneficiaries of the trust.[2] Horton brought a petition to construe the trust because the co-trustees had altered the trust a number of times, creating uncertainty regarding how the trust should be administered.

Horton brought his petition to construe the trust on September 24, 2004. Waugh, a citizen of Arizona, timely filed a Notice of Removal based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(i). He did not join any other defendants in his motion. On November 17, 2004, a federal district court judge issued an order expressing concern that the court "may not have jurisdiction to hear this case." The judge noted that three of the named defendants appeared to be citizens of Missouri and stated that if any defendants had been served in state court proceedings, removal would be improper due to lack of jurisdiction. The order directed Horton to file a brief "addressing whether any Missouri citizen defendants have been served in the underlying state cause of action."

On November 22, 2004, Horton filed a brief in reply to the district court's order stating that three of the defendants had been served in Missouri. Horton did not, however, file a motion to remand. On December 2, 2004, Waugh filed a reply brief in which he asserted that the

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[2] The twelfth defendant is named in the trust because he was a financial advisor to the trustees and has a copy of the trust.

other defendants were not required to join in removal because they had not responded to the complaint and were therefore nominal defendants. Waugh also filed a motion requesting that the federal district court dismiss all defendants that had not filed answers, arguing that these defendants were in default and should be dismissed.

The district court denied Waugh's motion to dismiss the other defendants and remanded the case to Missouri state courts due to a lack of complete diversity.

II.

We first note that Waugh's motion to remove was apparently defective from the outset due to his failure to join all defendants as required by our court's interpretation of 28 U.S.C. § 1446. *See Marano Enters. of Kansas* v. *Z-Teca Rests., L.P.*, 254 F.3d 753, 755 n.2 (8th Cir. 2001) ("Under the rule of unanimity, ordinarily all defendants must join in a notice of removal or the case will be remanded."). Although Waugh's failure to join the other defendants appears to be dispositive, we nonetheless consider the merits of his argument that, because Horton did not bring a motion to remand within thirty days of Waugh's motion to remove, he waived his right to have the case remanded to state court.

We must first determine whether our court has jurisdiction to review the district court's remand order. Under the so-called "forum defendant rule," a non-federal question case "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Congress has limited the power of appellate courts to review remands by district courts, stating that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). In *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-28, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995), the Supreme

Court clarified that "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." Section 1447(c) provides in relevant part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Accordingly, our court lacks jurisdiction to review remand orders that are based on procedural defects brought within thirty days or jurisdictional defects raised at any time before final judgment is entered. *Things Remembered*, 516 U.S. at 127-28.

Waugh argues that the violation of the forum defendant rule constitutes a procedural defect. Thus, according to Waugh, because Horton did not bring a motion to remand within thirty days, he waived his right to have the case remanded to state court. We disagree.

Waugh's assertion that the violation of the forum defendant rule constitutes a procedural defect is contrary to this circuit's precedent. In *Hurt* v. *Dow Chemical Company*, 963 F.2d 1142, 1146 (8th Cir. 1992), we held that the violation of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity capable of being waived." Waugh points out that other circuits have held to the contrary that the violation of the forum defendant rule is a procedural, nonjurisdictional defect, and urges us to abandon our reasoning in *Hurt*. *See, e.g.*, *Hurley* v. *Motor Coach Indus.*, 222 F.3d 377, 379 (7th Cir. 2000). We believe, however, that *Hurt* sets forth the better rule. Accordingly, we hold that Waugh's violation of the forum defendant rule constituted a jurisdictional defect. As such, because "an order remanding a case to the State court from which it

was removed is not reviewable on appeal," 28 U.S.C. § 1447(d), we lack jurisdiction to review the district court's order remanding the case at hand to state court.[3]

III.

We now turn to Waugh's argument that the district court erred in denying his motion to dismiss the other defendants in the case. According to Waugh, the defendants who failed to answer "should have been dismissed as nominal or dispensable parties," leaving Waugh as the only defendant and establishing complete diversity. As Waugh sees it, all of the other defendants are "nominal" because their "only interest in the suit was as named beneficiaries of the subject Trust."

Federal Rule of Civil Procedure 21 provides in relevant part that "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action on such terms as are just." The United States Supreme Court has stated that "it is well-settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989). The Court has also stated that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy."

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[3] It should be noted that Waugh's argument that Horton waived his right to have the case remanded by failing to file a motion to remand within thirty days fails to acknowledge that Horton demonstrated, per the district court's order, that Missouri defendants had been served within the thirty day window Horton had to file a remand motion. Thus, even if this case had been reviewed under the rule that the forum defendant rule is nonjursidictional, Waugh could not have prevailed, as Horton's compliance with the district court's order arguably obviated the need to file a motion to remand.

Navarro Sav. Ass'n. v. *Lee*, 446 U.S. 458, 460, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980).

In the case at hand, Horton was designated as the successor trustee by a "letter of instruction" attached to the trust. Horton then brought an action to construe the trust because he was "unable to ascertain with a full degree of certainty, the nature and extent of the written trust documents to which should be relied upon in the further administration of the trust and eventual distribution thereof." Petition to Construe Trust P14. It appears that eleven of the twelve defendants in this case will be affected to varying degrees by the court's interpretation of the trust, as each was named as a beneficiary at one point in the trust's much-altered existence. Thus, on the face of the pleadings, none of the defendants are dispensable, as they all were at one time beneficiaries to the trust. Determining which beneficiaries, if any, are dispensable requires an evaluation of the case on the merits by the district court. Accordingly, the district court did not err in denying Waugh's motion to dismiss the other defendants in this case.

IV.

As a final matter, we address Horton's motion for sanctions against Waugh. Horton requests that this court impose sanctions for damages and costs against Waugh under Fed. R. App. P. 38, which governs frivolous appeals and provides in relevant part that "if a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee." Horton asserts that Waugh's motion for removal to state court and motion to dismiss were without merit because mandatory authority dictated the case could not be removed.

Our court has stated that an appeal is frivolous "when the result is obvious or when the appellant's

argument is wholly without merit." *Newhouse* v. *McCormick & Co., Inc.*, 130 F.3d 302, 305 (8th Cir. 1997) (citing *Indianapolis Colts* v. *Mayor of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985)). We have also observed that "sanctions are appropriate where an appeal challenges district court decisions that are unquestionably supported by the great weight of the evidence and wholly in conformance with applicable law." *First Commercial Trust Co.* v. *Colt's Mfg. Co., Inc.*, 77 F.3d 1081, 1084 (8th Cir. 1996) (citation and quotation omitted).

We first observe that Waugh's motion to remove was arguably defective from the outset due to his failure to join all defendants as required by our court's interpretation of 28 U.S.C. § 1446. Further, as noted earlier, Waugh's argument that Horton waived his right to have the case remanded by failing to file a remand motion ignores the fact that Horton demonstrated that Missouri defendants had been served within the thirty day window to file a remand motion in accordance with the district court's order, which arguably obviated Horton's need to file said motion.

Overlooking these defects, Waugh's appeal rested on the premise that our court might overturn *Hurt* in light of contrary views expressed by other circuits. Although there are grounds for us to conclude that Waugh's appeal challenged a district court decision that was "wholly in conformance with applicable law," given the disagreements among the circuits regarding the nature of the forum defendant rule violations, we decline to impose sanctions under Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas A. Horton, *Appellee*,

vs.

Steven T. Waugh, *Appellant*

No. 05-1199

February 9, 2006, Decided

Order Denying Petition for Rehearing and for Rehearing *En Banc*

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Thomas A. Horton, *Plaintiff*

v.

Katherine A. Conklin; Norman S. Redhead; Stephen W. Templar; Steven T. Waugh; *Defendant-Appellant,* Church of the Holy Cross Episcopal; National Epileptic Foundation; St. Philips Episcopal Church and Outreach; Alison Horton Waldrip; Caring Friends of Denver; Lee Graber; Sylvia Graber; Steven Asay, *Defendants.*

Case No. 04-1002-CV-SJ-FJG

ORDER

Before the Court is defendant Steven T. Waugh's Notice of Removal (Doc. No. 1). Defendant Waugh premises his notice of removal on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332(a) and 1332(d). Also pending before the Court is defendant Waugh's Motion to Dismiss (Doc. No. 10).

The pending case was removed to federal court on November 3, 2004. On November 17, 2004, after reviewing the petition for removal, the Court issued an Order (Doc. No. 6) requiring plaintiff and defendant to file briefs regarding the propriety of jurisdiction of this matter in federal court. In particular, the Court was concerned because in cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. §1441(b). Three of the named defendants in plaintiff's petition (St. Philips Episcopal Church, Lee Graber, and Sylvia Graber) are citizens of the state of

Missouri. If these defendants have been served in the state court proceedings, removal would be improper and this Court would not have jurisdiction. *See Hurt* v. *Dow Chem. Co.*, 963 F.2d 1142, 1144-1145 (8th Cir. 1992) (noting that, under Eighth Circuit law, the ban on local defendants is a jurisdictional defect that may be raised at any time, as opposed to a procedural defect that must be raised by plaintiff within 30 days of the notice of removal).

On November 24, 2004, plaintiff responded to the Court's Order, informing the Court that all parties, including the Missouri defendants, had been served by certified mail. Plaintiff included certified copies of the return receipts demonstrating service. Therefore, it appears that Missouri citizens were served as defendants in state court proceedings, and removal jurisdiction in this Court would be improper.

On December 2, 2004, defendant Waugh filed a response to plaintiff's brief, arguing that the remaining defendants were not required to join in the removal because (1) they are merely nominal or formal parties, and (2) they did not respond to the complaint in any way. Regarding defendant's assertion that the remaining parties are merely nominal or formal, defendant Waugh provides no factual support or analysis for this assertion. Instead, defendant cites to three cases, all from outside this Circuit and over thirty years old, without providing any analysis as to why these cases apply to the facts at hand. The Court cannot accept conclusory allegations in making a determination on the propriety of federal jurisdiction. *See Monteil* v. *Thrift Drug, Inc. d/b/a Eckerd Drug*, 03-0558-CV-W-DW (Slip Opinion, August 27, 2003, p.2); *Wilson* v. *Target Corporation*, 04-0009-CV-W-HFS (Slip Opinion, September 30, 2004, p.4).

Defendant, in a related argument, also asserts that because the remaining defendants did not respond to the complaint, they should be considered nominal or formal

parties. Defendant asserts that all of the served defendants were served on or before October 1, 2004. Defendants asserts (without providing support, other than informing the Court that a Web site maintained by the State of Missouri contains this information) that none of the remaining served defendants filed a response to the petition as of November 2, 2004, when defendant Waugh filed his notice of removal. Because Missouri law requires an answer to be filed within 30 days of service, defendant argues that the remaining served defendants had all defaulted as of November 1, 2004, and were no longer properly considered to be defendants at that time. Defendant Waugh concurrently filed a motion to dismiss the defendants who failed to respond to the complaint (see Doc. No. 10).

There are numerous difficulties with defendant's argument. First, defendant has provided no evidence that supports his contention that answers have not been filed to plaintiff's complaint. Second, defendant does not represent that default judgment has been entered against the remaining defendants by the state court. This Court cannot enter a default judgment against Missouri parties in this case because the Court does not have removal jurisdiction over cases where Missouri parties remain as defendants.[1] As for defendant Waugh's motion to dismiss the defendants who failed to respond to the complaint, such motion is meritless. Plaintiff is the party in this circumstance who would have a right to request voluntary dismissal of parties who failed to respond to a complaint, not defendant Waugh.

---

[1] Furthermore, even if default were entered against the remaining parties, defendant Waugh would still likely need to move to sever his claims from the defaulting defendants before he would have a right to remove his case.

The party invoking the jurisdiction of a federal court bears the burden of proof in establishing that such jurisdiction is proper. *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); Kopp v. Kopp, 280 F.3d 883 (8th Cir. 2002). Federal courts are courts of limited jurisdiction, and a civil action brought in a state court may be removed by a defendant only if the federal court has original jurisdiction. 28 U.S.C. § 1441. Defendant has failed to meet his burden to prove that jurisdiction is proper in this Court; therefore, this matter will be remanded to the Circuit Court of Grundy County, Missouri.

Accordingly, for the above stated reasons, it is ORDERED that:

1) defendant Waugh's motion to dismiss (Doc. No. 10) is DENIED; and

2) this case is REMANDED to the Circuit Court of Grundy County, Missouri.

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: December 10, 2004
Kansas City, Missouri

(3)

No. 05-1419

Supreme Court, U.S.
FILED
JUN 8 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the "forum defendant rule," a civil action commenced in state court that meets the requirements of federal diversity jurisdiction may be removed to federal district court if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The question presented is:

Whether the Eighth Circuit was correct to hold, in conflict with other circuits, that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand, rather than a defect "other than lack of subject matter jurisdiction" that is waived if not raised in a timely motion to remand the case?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Counter-Statement of the Case	1
Reasons For Denying The Writ	8
I. The Holding Of The Eighth Circuit Complies With The Jurisdictional Statutes	8
A. The Circuits That Hold The Forum Defendant Rule Is Not Jurisdictional All Have Distinguishing Facts Which Favor The Application Of A Procedural Defect	10
B. The Eighth Circuit Holding in *Hurt* Complies With The Jurisdictional Statutes And Is Not Contrary To Other Circuits' Jurisdictional Or Procedural Defect Analysis	18
II. Jurisdictional Rules, Like The Forum Defendant Rule, Have Historically Been Strictly Construed	20
III. Whether the Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Or Not, The District Court Correctly Remanded The Case	22
IV. The Question Presented Does Not Merit Review	26
Conclusion	26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bowles v. Osmose Utils. Servs., 443 F.3d 670 (8th Cir. 2006) 25

Bregman v. Alderman, 955 F.2d 660 (5th Cir. 1992) 16

Brown v. Tokio Marine & Fire Ins. Co., Ltd., 284 F.3d 871 (8th Cir. 2002) 6

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 13

Coppee v. Venezolana de Cementos, S.A.C.A., 31 F.3d 70 (5th Cir. 1994) 16

Dellinger v. Atlas Tech., Inc., No. 92-2091, 1993 U.S. App. LEXIS 28313 (6th Cir. Oct. 28, 1993) 11

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 13

Farm Constr. Servs., Inc. v. Fudge, 831 F.2d 18 (1st Cir. 1987) 14, 17

Filla v. Norfolk So. Ry. Co., 336 F.3d 806 (8th Cir. 2003) 2

Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980) 17

Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972) 13, 19

Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004) 21

Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435 (6th Cir. 1924) 11, 19

Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005) 7, 8, 24

Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961) 20

TABLE OF AUTHORITIES – Continued

Page

Hurley v. Motor Coach Indus., Inc., 222 F.3d 377 (7th Cir. 2000) 1, 12, 13

Hurt v. Dow Chem. Co., 963 F.2d 1142 (8th Cir. 1992) 7, 10, 11, 14, 15, 17, 18, 19, 23, 26

In re FMC Corp. Packaging Sys. Div., 208 F.3d 445 (5th Cir. 2000) 15

In re Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) 15, 16

Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) 21

Johnson v. Odeco Oil & Gas Co., 864 F.2d 40 (5th Cir. 1989) 17

Korea Exch. Bank v. Trackwise Sales Corp., 66 F.3d 46 (3d Cir. 1993) 14, 15

Leininger v. Leininger, 705 F.2d 727 (5th Cir. 1983) 17

Lincoln Prop. Co. v. Roche, ___ U.S. ___, 126 S. Ct. 606 (2005) 3, 9, 26

Local Union 598 v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir. 1988) 11

Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985) 17

Loftis v. UPS, Inc., 342 F.3d 509 (6th Cir. 2003) 24

Marano Enter. of Kansas v. Z-Teca Rest., L.P., 254 F.3d 753 (8th Cir. 2001) 6, 9, 22

McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178 (1936) 23

Motion Control Corp. v. SICK, Inc., 354 F.3d 702 (8th Cir. 2003) 11, 26

Nolan v. Prime Tanning, Inc., 871 F.2d 76 (8th Cir. 1989) 17, 18, 23

TABLE OF AUTHORITIES – Continued

Page

Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) 21

Payne v. Brake, 439 F.3d 198 (4th Cir. 2006) 24

Pecherski v. GMC, 636 F.2d 1156 (8th Cir. 1981) .. 2, 3, 10, 22

Porterco, Inc. v. Igloo Prod., Corp., 955 F.2d 1164 (8th Cir. 1992) 5

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 1, 4

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 21

Snapper, Inc. v. Redan, 171 F.3d 1249 (11th Cir. 1999) 16, 17

Strawbridge v. Curtiss, 7 U.S. 267 (1806) 21

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 25

Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 2, 8, 9

Thompson v. Butler, 136 F.2d 644 (8th Cir. 1943) 19

Thorn v. Amalgamated Transit Union, 305 F.3d 826 (8th Cir. 2005) 22

United States v. Hays, 515 U.S. 737 (1995) 23

Vincent v. Dakota, Minn. & Eastern Ry. Corp., 200 F.3d 580 (8th Cir. 1966) 2

Warth v. Seldin, 422 U.S. 490 (1975) 23

Whittley v. Burlington N. & Sante Fe R.R. Co., 395 F.3d 829 (8th Cir. 2005) 2

Woodward v. Overmyer Co., 428 F.2d 880 (2d Cir. 1970) 14

TABLE OF AUTHORITIES – Continued

Page

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

Young v. Garrett, 149 F.2d 223 (8th Cir. 1945) 19

FEDERAL STATUTES

28 U.S.C. § 1331 1

28 U.S.C. § 1332 ..... 1, 4, 9, 15

28 U.S.C. § 1441 .. 1, 2, 3, 4, 5, 7, 9, 14, 15, 16, 18, 20, 21, 22, 24

28 U.S.C. § 1446 ..... 1, 6, 7, 20, 22

28 U.S.C. § 1447 ..... 1, 2, 3, 4, 7, 8, 9, 15, 16, 18, 20, 25

Fed. R. Civ. P. 46 5

STATE STATUTES

Mo. Rev. Stat. § 456.2-204 19

COUNTER-STATEMENT OF THE CASE

Federal courts are not only vested by statute with original jurisdiction to hear cases and controversies, but also are vested with removal jurisdiction to hear cases and controversies originating in state courts. 28 U.S.C. §§ 1331, 1332, 1441 (2006). Cases may be removed from state court into a federal court if they present a federal question or if the parties are completely diverse in citizenship and the controversy exceeds $75,000. 28 U.S.C. §§ 1331, 1332. Complete diversity requires that no plaintiff have the same citizenship of any defendant. *See* 28 U.S.C. § 1332(a)(1). Removal jurisdiction, however, does not allow a case to be removed if any of the defendants in the action are a citizen of the state where the plaintiff filed suit, referred to as the forum defendant rule. 28 U.S.C. § 1441(b); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 378 (7th Cir. 2000). The issue of the forum defendant rule is generally addressed in a remand order pursuant to 28 U.S.C. § 1447(c), which states, "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446(a)." Section 1447(c) also provides that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Section 1447(d) states, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the only exception for § 1443 civil rights cases. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996). The only other exception is when the decision to remand is based on grounds other than subject matter jurisdiction or defects in the removal procedure. *Id.* (finding that an abstention-based remand

order is appealable because "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)"); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343-45 (1976) (finding district court remand due to crowded docket is not ground authorized by § 1447(c), therefore remand order is appealable).

The district court in the instant case did not specifically cite to 28 U.S.C. § 1447(c) in its remand order, but noted that "in cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed," citing 28 U.S.C. § 1441(b). Petitioner's App. 9a. It is not necessary for the district court to explicitly cite to 28 U.S.C. § 1447(d). *Filla v. Norfolk So. Ry. Co.*, 336 F.3d 806, 809 (8th Cir. 2003). Although the court of appeals must determine by independent review the actual grounds for the district court's remand order, *Vincent v. Dakota, Minn. & Eastern Ry. Corp.*, 200 F.3d 580, 581 (8th Cir. 1966), it need not do so in a case where it is undisputed that the district court remanded because it believed it lacked subject matter jurisdiction. *Whittley v. Burlington N. & Sante Fe R.R. Co.*, 395 F.3d 829, 830 (8th Cir. 2005).

Section 1441(b) allows for removal "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Despite the "joined and served" language of § 1441(b), the Eighth Circuit held that "the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal." *Pecherski v. GMC*, 636 F.2d 1156, 1160 (8th Cir. 1981). The Eighth Circuit "explicitly rejected the argument that § 1441(b), by implication,

expanded removal jurisdiction to permit removal, despite want of diversity, if a resident defendant whose presence would defeat diversity had not been served," and held that "a court, in determining the propriety of removal based on diversity of citizenship, must consider all named defendants, regardless of service." *Id.* at 1160-61.

1. The "Forum Defendant Rule."

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b). Section 1441 allows for removal only if none of the defendants is a citizen of the state in which the action is brought. This Court recently declined to review the various circuit holdings in addressing the issue of a forum state defendant as pertains to removal jurisdiction. *See Lincoln Prop. Co. v. Roche*, ___ U.S. ___, 126 S. Ct. 606, 613 n.6 (2005).

2. Remand To State Court and Appellate Review.

Section 1447(c) mandates a remand of the case to the state court of original filing, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction. . . ." 28 U.S.C. § 1447(c) (emphasis added). When a district court order is based on a lack of subject matter jurisdiction, "the order – whether erroneous

or not and whether review is sought by appeal or be extraordinary writ – must stand." *Quackenbush*, 517 U.S. at 711-12. As directed under § 1441(b) and § 1447(c), the district court in the instant case raised the validity of removal with forum state defendants.

3. Factual Background.

Respondent Thomas A. Horton is a successor trustee for a trust created in Grundy County, Missouri. Because numerous and substantial amendments to the trust raised legal issues, Mr. Horton filed a Petition to Construe Trust Or In The Alternative For Judicial Determination Of Trust in the Circuit Court of Grundy County, Missouri on September 27, 2004. Respondent named as defendants the twelve beneficiaries affected by the trust and the subsequent changes.[1]

4. The District Court's Order.

On November 3, 2004, Petitioner, one of the twelve defendants, filed a Notice of Removal in the United States District Court for the Western District of Missouri, "pursuant to 28 U.S.C. §§ 1332(a) and 1332(d)." No other defendants joined in Petitioner's removal. Petitioner acknowledged in his Notice of Removal that three of the defendants were residents of Missouri, namely, St. Philips

[1] This case is about the removal of a petition to construe a trust, not about Petitioner's relationship with the trustors or the other beneficiaries, nor is it a platform to present Petitioner's allegations of wrongful death, as Petitioner inappropriately suggests in his Factual Background statement.

Episcopal Church and Lee and Sylvia Graber, and, as such, were forum state defendants.

The district court issued a preliminary order on November 17, 2004, addressing one issue only, the possible lack of jurisdiction pursuant to 28 U.S.C. § 1441(b). *Order,* Case No. 04-1002-CV-SJ-FJG (W.D. Mo. Nov. 17, 2004), Respondent's App. at 1b. The court referred to the three Missouri defendants and noted that if the defendants had been served, federal jurisdiction would be precluded. *Id.* at 1b-2b. The court then directed Respondent to file "a short brief addressing whether any Missouri citizen defendants had been served in the underlying state cause of action, attaching copies of returns of service of summons as needed." *Id.* at 2b.

On or about November 22, 2004, Respondent filed a short brief stating that all defendants named in the original suit had been served, affirming the fact that three of the defendants were Missouri residents and providing certified copies from the Clerk of the Court, Grundy County, of the signed returned receipts of service.[2] Although Respondent did not file a motion to remand, he provided the factual evidence to defeat removal.

On December 2, 2004, Petitioner filed a brief acknowledging the court's concerns as to complete diversity under § 1441(b) and the fact that no other defendant had joined

[2] Petitioner raises the issue of Missouri service of process for in-state parties. However, this argument was never raised in the state court or the district court. It first appeared on appeal in Petitioner's Reply Brief. Therefore, this issue may not be considered. *See Porterco, Inc. v. Igloo Prods., Corp.*, 955 F.2d 1164, 1173 (8th Cir. 1992) (citing to Fed. R. Civ. P. 46); *see also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

in Petitioner's Notice of Removal. *Defendant's Brief,* Case No. 04-1002-CV-SJ-FJG (W.D. Mo. Dec. 2, 2004), Respondent's App. at 3b. Petitioner argued that all other defendants, except for himself, were dispensable parties who had defaulted, and were therefore no longer parties to the lawsuit when Petitioner removed the case to federal court. *Id.* at 3b-4b. Petitioner asserted that "nominal or formal parties, being neither necessary nor indispensable, are not required to join in the notice of removal." *Id.* at 3b. Petitioner did not cite to any mandatory authority to support this conclusion, but referenced a Fifth Circuit case from 1970, a Michigan federal district court case from 1958, and a Connecticut federal district court case from 1961. *Id.* at 3b-4b. Based on these same allegations, Petitioner also filed a Motion To Dismiss requesting dismissal of all defendants alleged to have not filed responsive pleadings to Respondent's petition by November 2, 2004, which meant dismissing all defendants except for Petitioner. *Id.* at 5b. Petitioner cited no statutory or case authority to support this motion.

On December 3, 2004, Petitioner filed a supplemental brief containing a single argument that his Notice of Removal was timely, due to the fact that, "The law in the Sixth Circuit is that a defendant has thirty days to cause an effective removal starting on the day that defendant was served, even if other defendants were served first," and citing to two Eighth Circuit cases, *Brown v. Tokio Marine & Fire Insurance Co., Ltd.*, 284 F.3d 871 (8th Cir. 2002) (determining application of one-year limitation period set out in 28 U.S.C. § 1446(b) where complete diversity existed at time of filing original complaint) and *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753 (8th Cir. 2001) (holding that later-served

defendants have thirty days to file a notice of removal with the unanimous consent of their co-defendants, even though first-served co-defendants did not file notice of removal within thirty days of having been served).

On December 10, 2004, Judge Gaitan issued an order remanding the case back to the Circuit Court of Grundy County for lack of diversity jurisdiction under 28 U.S.C. § 1441(b) because the three Missouri defendants had been served. The court also noted that Defendant had no power to dismiss the other defendants and only the plaintiff may request dismissal of parties who fail to respond. Petitioner's App. at 11a.

5. The Eighth Circuit's Decision.

The Eighth Circuit held that it lacked jurisdiction to hear Petitioner's appeal of the district court's remand order pursuant to 28 U.S.C. § 1447(d). *Horton v. Conklin*, 431 F.3d 602, 604 (8th Cir. 2005), *reh'g & reh'g en banc denied Horton v. Waugh*, No. 05-1199 (8th Cir. Feb. 9, 2006), Petitioner's App. at 5a. The court noted that Petitioner's notice of removal was defective pursuant to 28 U.S.C. § 1446, and this fact was dispositive. *Id.*, Petitioner's App. at 3a. However, the court considered the merits of Petitioner's argument because Respondent had not filed a motion to remand. *Id.*

The Eighth Circuit held that Petitioner's argument – the presence of a defendant in the forum state was a "defect" rather than a lack of subject matter jurisdiction – was contrary the Eighth Circuit law under *Hurt v. Dow Chemical Company*, 963 F.2d 1142, 1146 (8th Cir. 1992), which holds that a violation of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity

capable of being waived." *Horton*, 431 F.3d at 605, Petitioner's App. at 4a. The court also noted that Respondent had not waived his right to have the case remanded because he responded to a direct query from the district court about removal jurisdiction, and provided evidence of service of the Missouri defendants prior to the thirty-day window in order to defeat Petitioner's removal. *Id.* at 605 n.3, Petitioner's App. at 5a n.3.[3]

REASONS FOR DENYING THE WRIT

I. The Holding Of The Eighth Circuit Complies With The Jurisdictional Statutes.

This Court addressed the issue of "whether § 1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447(c)." *Thermtron*, 423 U.S. at 343. This Court found that the district court's removal order was not based on grounds authorized by § 1447(c). *Id.* (emphasis added). This Court limited the scope of nonreviewability under § 1447(d) to only those remand orders that are issued under § 1447(c) and that invoke the grounds specified in § 1447(c). *Id.* at 345-46. That is precisely the case before

[3] The order denying rehearing and rehearing en banc was issued on February 9, 2006. Respondent has never received any service or filings concerning Petitioner's Petition for Writ of Certiorari from Petitioner. On May 10, 2006, Respondents were first made aware that Petitioner had filed a Notice of Petition for Writ through a solicitation from a printing company stating that Mr. Waugh had filed a Petition for Writ of Certiorari and Respondent's Brief in Opposition was due on June 8, 2006. Respondent contacted the clerk of the U.S. Supreme Court to confirm Petitioner's filings and on May 12, 2006, Respondent received a copy of Petitioner's Petition for Writ forwarded by the clerk of this Court.

the court now. The district court's order was issued under § 1447(c) based on lack of subject matter jurisdiction.

The facts of the instant case do not present an exception under *Thermtron*. First, the defendant in *Thermtron* properly removed the case to federal court. 423 U.S. at 338. Petitioner did not. For proper removal, all served defendants must join in the petition for removal. *Marano*, 254 F.3d at 755. Respondent presented evidence that all defendants had been served, including the resident Missouri defendants. Petitioner removed the case without the consent of any other defendant, including three forum state defendants.

Second, there was complete diversity in *Thermtron*. 423 U.S. at 337. There is not complete diversity of citizenship among the defendants in the instant case, even though Petitioner based his removal solely on the grounds of diversity and amount in controversy. The district court's remand order was issued on grounds authorized by § 1447(c), that of "lack of subject matter jurisdiction." The district court lacked subject matter jurisdiction because Defendant removed to federal court when there was not complete diversity as required by § 1441(b).

In addition, the instant case could not have originally been filed in federal court because there was not complete diversity. Although the Eighth Circuit identified Respondent as a citizen of Maine, his state of residence, diversity jurisdiction pursuant to § 1332(c)(2) directs that "the legal representative of [a decedent's estate] . . . shall be deemed to be a citizen only of the same State as the decedent . . . ." *Lincoln Prop.*, ___ U.S. ___, 126 S. Ct. at 616. The decedent trustors were residents of Missouri. Therefore, the trustee must be considered to be a citizen of Missouri, and

complete diversity did not exist for federal jurisdiction. There was not complete diversity, and the Eighth Circuit did not "incorrectly" remand the case.

While the Eighth Circuit recognizes there are sister circuits that interpret the forum defendant rule as a procedural defect in certain circumstances, when one looks more closely at the analysis in many of the "procedural defect" case holdings, these holdings reflecting a circuit split are not substantively inapposite.

A. The Circuits That Hold The Forum Defendant Rule Is Not Jurisdictional All Have Distinguishing Facts Which Favor The Application Of A Procedural Defect.

1. Jurisdictional Circuits.

The Eighth Circuit construes the forum defendant rule as a jurisdictional requirement based on subject matter jurisdiction. *Pecherski*, 636 F.2d at 1160. The Eighth Circuit first addressed the issue of the forum defendant rule in *Pecherski*. On plaintiff's motion to set aside the judgment and remand the case to state court, the district court held that, although the defendant had not established the nondiversity of a Jane Doe defendant, defendant was not required to do so because that defendant had not yet been served. *Id.* at 1158-60. The Eighth Circuit held that the forum defendant rule limits jurisdiction based on diversity of citizenship in removed cases, and that the removal statute cannot be liberally construed. *Id.* at 1160-61. The Eighth Circuit reversed and remanded the case to state court. *Id.* at 1161.

The Eighth Circuit reinforced its strict construction of the forum defendant rule in *Hurt*, holding that a violation

of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity capable of being waived." *Hurt*, 963 F.2d at 1146; *see also Motion Control Corp. v. SICK, Inc.*, 354 F.3d 702, 705 (8th Cir. 2003) (upholding *Hurt* precedent of forum defendant jurisdiction). In the instant case, the district court and the Eighth Circuit relied on established statutory and case law in respectively remanding the case and denying review.

Although Petitioner identifies the Sixth Circuit as a firm proponent of the procedural defect interpretation, the Sixth Circuit is by no means decided. The Sixth Circuit reviewed a case where the defendant removed the action to the district court and the plaintiff never made a request for remand but continued to prosecute up to and including trial and judgment. *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 436 (6th Cir. 1924). The Sixth Circuit held plaintiff's failure to timely challenge removal indicated consent, given the fact that plaintiff could have originally brought suit in federal court. *Id.* Once again, the case is easily distinguished where the plaintiff never contested jurisdiction until after a judgment had been rendered. *Id.* In fact, the court noted, "[I]f the record in [federal] court does not show jurisdiction it is the court's duty, of its own motion, to refuse to exercise it." *Id.* This is exactly what the district court did in the instant case. In a more recent, although unpublished case, the Sixth Circuit reaffirmed that it was obligated to raise jurisdictional issues *sua sponte*, and held that the forum defendant rule precluded removal of the action in *Dellinger v. Atlas Technologies, Inc.*, No. 92-2091, 1993 U.S. App. LEXIS 28313, at *3-4 (6th Cir. Oct. 28, 1993).

The Ninth Circuit interprets the forum defendant rule with a duality of purpose. In *Local Union 598 v. J.A. Jones*

Construction Co., 846 F.2d 1213, 1215 (9th Cir. 1988), the court held that "[r]emoval is a question of federal subject matter jurisdiction reviewable *de novo*." However, the court also held that "if a state action includes non-diverse parties, it may not be removed until those parties have been dismissed." *Id.* The Ninth Circuit held that the forum defendant rule is jurisdictional, but is waivable when the case has already proceeded to dismissal on a dispositive motion or a judgment has been entered in the district court. *Id.*

2. Procedural Circuits.

Perhaps considered the seminal case in establishing the forum defendant rule as a procedural defect is the Seventh Circuit's holding in *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 379 (7th Cir. 2000). The Seventh Circuit noted that the issue involved was one of procedural removal rather than one of true jurisdictional matter. In *Hurley*, the plaintiff filed a personal injury action in Illinois state court against four defendants, one of which removed the case to district court, even though one of the defendants was a resident of Illinois. *Id.* at 378. After removal, plaintiff dismissed the forum state defendant. *Id.* Plaintiff and the remaining defendant agreed to submit the case to a magistrate judge. *Id.* The Seventh Circuit noted that the facts of *Hurley* were particular and distinguished the case. *Id.* at 380. The court stated the problem in *Hurley* was not critical, in that "the case as it arrived in federal court met every requirement for federal jurisdiction: it simply took the wrong path, in a sense, because there was an in-state defendant. This, we think, is more a matter of removal procedure . . . [rather] than a matter of jurisdiction." *Id.* at 380.

The Seventh Circuit was also scrupulous in noting the particular problems with many of the forum defendant cases, stating the actual issue in *Hurley* was one of procedural removal rather than one of true jurisdictional matter. 222 F.3d at 379. The Seventh Circuit stated that "the theme of several recent Supreme Court decisions that have considered curable defects in diversity jurisdiction has been to find that as long as the court's jurisdiction is proper at the time of trial and judgment, the case need not be dismissed because of an earlier jurisdictional problem." *Id.* In coming to this conclusion, the Seventh Circuit relied on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

In *Caterpillar*, all claims concerning the nondiverse defendant were settled and dismissed before trial commenced. 519 U.S. at 73. This Court concluded that even though the case had not been properly removed, "the District Court did have jurisdiction of the parties at the time it entered judgment. Under such circumstances the validity of the removal procedure followed may not be raised for the first time on appeal." *Id.* (citing *Grubbs v. GE Credit Corp.*, 405 U.S. 699, 700 (1972)). This Court stated its overriding concern, "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 76. The instant case has no parallels to *Caterpillar*, where the removal procedure was not questioned until after trial. Respondent's suit was filed in state court on September 27, 2004, defendants were served between September 28 and October 4, 2004, and the case removed on November 3, 2004. The district court raised the issue of jurisdiction shortly after removal in a November 17, 2004 order.

The First Circuit addressed the issue in *Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987), noting that although removal was defective because the defendants were citizens of the forum state, plaintiff continued to prosecute the case in district court without objection until after judgment had been rendered. The First Circuit held that plaintiff's failure to object constituted implicit consent and waiver of its right to object to removal. *Id.* In the instant case, the district court immediately questioned jurisdiction and Respondent provided evidence verifying forum state defendants prohibiting removal.

The Second Circuit briefly addressed the fact that an action should have been remanded under § 1441(b), the forum defendant rule, but the plaintiffs failed to raise the issue until the appeal. *Woodward v. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970). The Second Circuit based its holding on whether the district court would have had original diversity jurisdiction had the case been filed in the federal court, and finding it would have been based on complete diversity. In addition, the court noted the uniqueness of this particular case, which involved a mortgage foreclosure action. *Id.* at 883. This case is clearly distinguished from *Hurt* or the instant case.

In *Korea Exchange Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1993), the Third Circuit held that "in considering whether jurisdictional defects existed, the relevant inquiry is whether the case could have been filed originally in federal court." The court concluded that "an irregularity in removal of a case to federal court is to be considered 'jurisdictional' only if the case could not initially have been filed in federal court." *Id.* Under this holding, the district court in the instant case correctly

remanded because there was neither a federal question nor was there complete diversity.[4] The Eighth Circuit arrived at the same conclusion dictated by the holding in *Korea Exchange Bank*. The Third Circuit discussed the fact that "section 1441(b)'s bar against removal by a forum-state citizen is not jurisdictional." *Korea Exch. Bank*, 66 F.3d at 50. However, a forum state defendant did not remove the instant case from state court.

The Third Circuit repeated the test that "an irregularity in removal of a case to federal court is to be considered 'jurisdictional' only if the case could not initially have been filed in federal court," in *In re FMC Corporation Packaging Systems Division*, 208 F.3d 445, 450 n.6 (5th Cir. 2000). The court concluded that § 1447(c) "does not authorize a District Court's *sua sponte* remand of an action based on a defect in the notice of removal, even where the notice of removal is timely." *Id.* at 451. However, the instant case was remanded for lack of jurisdiction, that is, diversity, not a defect in the removal procedure.

The Fifth Circuit held that § 1447(d) does not bar review of remands not based on § 1447(c), leaving "remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders." *In re Shell Oil Co.*, 932 F.2d 1518, 1520-21 (5th Cir. 1991). The court held the

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[4] In determining whether a defect is procedural, many of the other circuits rely on the inquiry of whether the case could have been originally filed in federal court, as discussed *infra*. In the instant case, because there is no federal question, complete diversity must have existed at the time of the original filing. However, as previously noted, Respondent, as trustee, is a citizen of Missouri. Therefore, whether under the application of *Hurt* or of "procedural defect," the case could not have originally been filed in federal court pursuant to 28 U.S.C. § 1332(a), making this inquiry jurisdictional, not procedural.

remand order in the case was reviewable because remand was based on an out-of-time motion. *Id.* In *In re Shell*, the district court never questioned jurisdiction under § 1447(c), unlike the district court judge in the instant case, who immediately questioned the validity of subject matter jurisdiction upon removal.

More recently, the Fifth Circuit held that a removal action "violated § 1441(b), which provides that a diversity action 'shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.'" *Bregman v. Alderman*, 955 F.2d 660, 663 (5th Cir. 1992). The court in *Bregman* noted that the holding in *In re Shell* specifically "limit[ed] our holding to cases in which the remand motions were not timely, and in which the remand orders were not based on lack of subject matter jurisdiction." *Id.* (citing *In re Shell*, 932 F.2d at 1526 n.4). When a remand order is based on grounds pursuant to § 1447(c), the Fifth Circuit held that appellate review was unavailable under § 1447(d). *Coppee v. Venezolana de Cementos, S.A.C.A.*, 31 F.3d 70, 72 (5th Cir. 1994). These Fifth Circuit holdings reflect the varying interpretations within the circuits, like the varying interpretations between the circuits, where there is some confusion over removal diversity jurisdiction, original diversity jurisdiction, and subject matter jurisdiction, as each holding demonstrates by the courts' emphasis on the facts of the individual case.

In the Eleventh Circuit case of *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1251 (11th Cir. 1999), remand was requested pursuant to a forum selection clause contained in several prior agreements made by the parties. The Eleventh Circuit specifically stated that "subject matter

jurisdiction is not at issue here," because the issue was enforcement of a forum selection clause. *Id.* at 1253. The facts of *Hurt* and the instant case do not fall within the fact pattern of *Snapper*.

The Eighth Circuit has also applied "procedural defect" involving forum state defendants. In *Nolan v. Prime Tanning, Inc.*, 871 F.2d 76, 77 (8th Cir. 1989), six of seven served defendants joined in the notice of removal except for one British corporation, "who was not participating in the suit in any way." The Eighth Circuit held, "Procedural removal requirements, such as those involved here, are not jurisdictional, and thus a party may waive the right to object to removal on these grounds," citing to *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985), *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983), and *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

In reviewing the district court's denial of remand in *Nolan*, the Eighth Circuit noted that the plaintiffs had consented to the dismissal of a diversity-destroying defendant, had never questioned the district court's jurisdiction after removal, had actively engaged in litigation in the district court, and only sought remand after several unfavorable rulings. 871 F.2d at 78-79. The Eighth Circuit looked to the First and Fifth Circuits to make a determination as to whether there was a jurisdictional question or a procedural defect.

> In *Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987), the plaintiffs litigated in federal court for almost a year, seeking to remand only after judgment had been rendered. *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 42 (5th Cir. 1989) involved a plaintiff who,

> once brought into federal court, engaged in discovery, amended his complaint to join new parties, and waited until motions for summary judgment were filed before requesting remand. In both cases the courts upheld district court findings of waiver. We believe that this case presents similar circumstances, and we hold that the district court acted properly in refusing to remand this case to state court.

Nolan, 871 F.2d at 79. The Eighth Circuit is not that separated from the sister circuits in addressing a procedural defect.

B. The Eighth Circuit Holding in *Hurt* Complies With The Jurisdictional Statutes And Is Not Contrary To Other Circuits' Jurisdictional Or Procedural Defect Analysis.

While the holding in *Hurt* may be viewed as a stricter construction of removal jurisdiction than the other sister circuit cases discussed herein, it is also true that neither *Hurt* nor the instant case are based on a marked absence of challenge to removal, as are many of the circuit cases. Many of those cases involved suits that had gone to trial and judgment without challenge. In the instant case, the district court immediately challenged subject matter jurisdiction pursuant to § 1447(c), because it was apparent on the face of the pleadings that the case was not removable under § 1441(b) due to three in-state defendants.

Yet Petitioner removed the case, willfully and wantonly discounting the in-state defendants and ignoring the necessary consent from the other defendants. The court in *Hurt* emphasized the importance of plaintiff's right to choose a forum, and that removal jurisdiction should not

be "an alternative means for a defendant to reach that end." 963 F.2d at 1144. The Eighth Circuit read the jurisdictional statutes narrowly and held that "if one of the statutory requirements is not met, the district court has no jurisdiction." *Id.* at 1145. Like the facts in *Hurt*, where the plaintiff did not have a federal claim, neither did the plaintiff in the instant case. This was a probate matter, with all parties indispensable, "real parties in interest." *See* Mo. Rev. Stat. § 456.2-204 (stating venue for judicial proceedings involving affairs of a trust is probate division of state circuit court where trust is registered or could be registered); *Thompson v. Butler*, 136 F.2d 644, 649 (8th Cir. 1943) (holding that probate matters are generally "creatures of state law"); *Young v. Garrett*, 149 F.2d 223, 229 (8th Cir. 1945) (holding administrators of an estate and all heirs or persons interested as distributees of an estate are indispensable parties).

The court in *Hurt* noted that the facts showed there were no grounds for original jurisdiction and believed the defendant used federal preemption to force removal for its own purposes, thereby usurping the plaintiff's right to select the forum of its own choice. 963 F.2d at 1144; *see also Handley-Mack Co.*, 2 F.2d at 436-37 (discussing the fact that choice of original forum is plaintiff's). The court in *Hurt* discussed this distinction where a case was removed without challenge and tried on the merits in *Grubbs v. General Electric Credit Corporation*, 405 U.S. 699 (1972). Although the Eighth Circuit recognized that the plaintiff in *Hurt* could have filed her claim in federal court based on diversity, but chose not to, *see* 963 F.2d at 1145, Respondent had no reason or intent to file a probate matter in federal court and could not have originally filed in federal court due to lack of complete diversity.

II. Jurisdictional Rules, Like The Forum Defendant Rule, Have Historically Been Strictly Construed.

The many cases on jurisdiction indicate a basic confusion of how removal jurisdiction, original jurisdiction, and subject matter jurisdiction relate to one another. Removal jurisdiction and original jurisdiction might be considered subsets of subject matter jurisdiction, each limited by different restrictions. However, all of the limitations remain jurisdictional and should be non-waivable, as indicated in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961):

> Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.

The fundamental rules of statutory construction are also persuasive for a narrow construction of the jurisdictional statutes. Section 1441, which contains the forum defendant rule, details the scope of "subject matter jurisdiction" in removal cases. Sections 1446 and 1447 are identified as "procedural" requirements. Section 1441(b) basically states that the district courts have removal jurisdiction where they would have original jurisdiction, with the exception of the forum defendant rule. The forum defendant rule expressly states that diversity actions "shall be removable only if" none of the defendants is a citizen of the forum state, (emphasis added), and should

therefore be construed strictly as a jurisdictional rule, as the Eighth Circuit does.

In addition, the fact that original diversity jurisdiction is narrowly interpreted and strictly enforced, is instructive in construing removal jurisdiction. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941). Although superceded in part by statute, the seminal case of original diversity jurisdiction is *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). This Court held that in a diversity action, each plaintiff should be of diverse citizenship from every defendant. *Id.* Again, although modified by statute, the seminal case on removal diversity jurisdiction is *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). This Court held that "the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Id.* at 108. The most logical interpretation of the forum defendant rule's limitation on removal diversity is that it should be strictly construed.

This Court's holding in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), supports a jurisdictional construction of the forum defendant rule. Although the holding in *Grupo Dataflux* does not address § 1441(b), it does discuss the issue of jurisdictional defect, and notes that the problem with finding waiver when a party has failed to object to a jurisdictional defect contradicts "the established principle" that subject matter jurisdiction may be raised at any point in the proceedings. *Id.* at 576. This supports a jurisdictional construction of the forum defendant rule, as opposed to the procedural construction applied by some of the circuit courts.

III. Whether the Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Or Not, The District Court Correctly Remanded The Case.

Under no circumstances, given the facts of the instant case, would the Eighth Circuit have been obliged to reverse the district court's remand order. Removal is authorized by 28 U.S.C. § 1441 and governed by § 1446. *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2005). "Where there are multiple defendants, all must join in a notice to remove within thirty days of service." *Id.* In the Eighth Circuit, with the issue of removal jurisdiction, a district court must consider all forum state defendants, even though they may not yet have been served. *Pecherski*, 636 F.2d at 1160. The Eighth Circuit and the district court judge involved in the instant case were well versed in the intricacies of a defendant's responsibilities in a removal procedure, both having analyzed the question in depth in one of the Eighth Circuit's seminal cases on removal, *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (accepting the rule of unanimity and holding that "later-served defendants in this case had thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants, even though the first-served co-defendants did not file a notice of removal within thirty days of service on them").

Petitioner acknowledged there were eleven other defendants involved in the instant action, but asserted that all of the other defendants were "merely nominal or formal parties," and told the district court that all of the other defendants "did not respond to the Complaint in any

way." Respondent's App. at 3b. Petitioner's only argument in support of these conclusions was the single statement, "Because the other defendants all defaulted, they are properly considered to be nominal or formal defendants." *Id.* at 4b. As the district court judge noted, Petitioner failed to present any factual support or case law to support his allegations or conclusion. Petitioner's App. at 10a-11a. In addition, when preparing the appeal, these defendants contacted by Respondent stated they had never received notification of a notice of removal.

"[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' . . . 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *United States v. Hays*, 515 U.S. 737, 743 (1995) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Petitioner failed to allege facts and law "demonstrating" that he properly invoked removal jurisdiction. *See id.*

Petitioner's contention that *Hurt* supported Petitioner's removal without consent of all the defendants, is an overly broad interpretation of the statement in *Hurt*. The court in *Hurt* affirmed the holding in *Nolan*, 871 F.2d at 77, agreeing to the fact that where one defendant, "who was not participating in the suit in any way," did not join in the removal notice, the defect was procedural, not jurisdictional. 963 F.2d at 1146 n.1. Neither the holding in *Nolan* or *Hurt* supports Petitioner's argument that he did not need consent from any other defendant. In the instant case, all twelve defendants were identified as real parties in interest. The failure of eleven out of twelve of those defendants to consent to removal cannot be a "mere"

procedural defect simply because the Petitioner deems it so in order to obtain his preferred forum.

As for Petitioner's reliance on case law outside of the Eighth Circuit in reviewing the underlying district court of Missouri actions, again, the facts of the cases are distinguished from the instant case. In *Payne v. Brake*, 439 F.3d 198, 202-03 (4th Cir. 2006), a wrongful death action against approximately twenty-two state entities and employees, with extended procedural problems and two separate suits, the critical issue involved a statute of limitations problem. The court noted that the district court had jurisdiction because the plaintiff had alleged federal law violations in her petition. *Id.* at 204. In *Loftis v. UPS, Inc.*, 342 F.3d 509, 517 (6th Cir. 2003), the court held that the district court should have granted a motion to remand given the fact that one of the defendants objected to removal and had sought remand.

In addition, the Eighth Circuit did not err in stating that Respondent's brief providing evidence of service for the forum state defendants "arguably obviated the need to file a motion to remand." *Horton*, 431 F.3d at 605 n.3; Petitioner's App. at 5a n.3. Petitioner misrepresents the facts when he states, "Respondent's brief recited only the facts concerning service upon the in-state defendants; it did not request remand." The district court issued an order on November 17, 2004, fourteen days after Petitioner filed his Notice of Removal, stating its concern was lack of jurisdiction to hear the case, "In cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. § 1441(b)." Respondent's App. at 1b. The district court's order made it clear that "if these defendants have been

served in the state court proceedings, removal would be improper and this Court would not have jurisdiction." *Id.* at 1b-2b. The court directed Respondent to submit "a short brief addressing whether any Missouri citizen defendants have been served in the underlying state cause of action . . . ." *Id.* at 2b. As directed, Respondent filed a short brief providing evidence of service for all three Missouri defendants.

The purpose of the district court's order was clear. Under the federal rules of simplified pleadings in civil actions, giving the opposing party "fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved," is sufficient. *Bowles v. Osmose Utils. Servs.*, 443 F.3d 670, 675 (8th Cir. 2006) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002)). Petitioner knew what sort of claim the district court and Respondent were making due to the district court's order questioning jurisdiction. *See id.* Filing a motion for remand was superfluous in the instant case.

The district court did not *sua sponte* remand a case based on a defect in the removal process, as Petitioner states and supports with inapposite sister circuit cases. The district court believed this was a concern of subject matter jurisdiction, which the court may raise at any time before final judgment. 28 U.S.C. § 1447(c). The fact that Respondent's Reply to Affirmative Defenses and Answer was filed in a timely manner, which at that time was while the case was in the district court, and that Respondent's "Wherefore" clause requested adjudication, is specious evidence that Respondent intended for the case to stay in the district court. Petitioner's reliance on this point is without merit.

In any event, the instant case could never have been originally filed in federal court because there was no federal question involved nor was there complete diversity, with the citizenship of the trustee, Respondent, legally being derived from the state of the decedent. *See Lincoln Prop.*, ___ U.S. ___, 126 S. Ct. at 616.

IV. The Question Presented Does Not Merit Review.

The sister circuits, within and without, have varying opinions, based on the facts of the individual cases, as to the determination of procedural defect and subject matter jurisdiction. In the 80 years since the question first arose, the circuits have refined each holding based on the facts of each case. This Court had the opportunity to review the question in *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992) and *Motion Control Corp. v. SICK, Inc.*, 354 F.3d 702 (8th Cir. 2003), and declined to do so. More recently, in *Lincoln Property Company v. Roche*, ___ U.S. ___, 126 S. Ct. 606, 613 n.6 (2005), this Court declined to review the issue that "several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a 'procedural' defect, not a 'jurisdictional' bar, and that the defect is waived if not timely raised by the plaintiff." Respondent respectfully maintains, given the particular facts of this case, it is not appropriate or suitable to use this case to review a question of differing interpretations of the forum defendant rule within the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's Petition for Writ of Certiorari and affirm the decision of the Eighth Circuit

that it lacked jurisdiction to review the district court's order remanding the case to state court.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

THOMAS A. HORTON Plaintiff, vs. KATHERINE A. CONKLIN, NORMAN S. REDHEAD, STEPHEN W. TEMPLAR, STEVEN T. WAUGH, HOLY CROSS EPISCOPAL CHURCH, NATIONAL EPILEPSY FOUNDATION, ST. PHILIPS EPISCOPAL CHURCH, ALISON HORTON WALDRIP, CARING FRIENDS OF DENVER, LEE GRABER, SYLVIA GRABER, and STEVEN ASAY, Defendants.	)	Case No. 04-1002-CV-SJ-FJG

ORDER

Before the Court is defendant Steven T. Waugh's Notice of Removal (Doc. No. 1). Defendant Waugh premises his notice of removal on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332(a) and 1332(d).

In its preliminary review of this matter, the Court is concerned that it may not have jurisdiction to hear this case. In cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. §1441(b). From the face of

plaintiffs complaint it appears that three of the named defendants (St. Philips Episcopal Church, Lee Graber, and Sylvia Graber) are citizens of the state of Missouri. If these defendants have been served in the state court proceedings, removal would be improper and this Court would not have jurisdiction. See Hurt v. Dow Chem. Co., 963 F.2d 1142, 1144-1145 (8th Cir. 1992) (noting that, under Eighth Circuit law, the ban on local defendants is a jurisdictional defect that may be raised at any time, as opposed to a procedural defect that must be raised by plaintiff within 30 days of the notice of removal).

In order to more quickly determine whether this Court has jurisdiction to hear this case, the Court **DIRECTS** plaintiff to file a short brief addressing whether any Missouri citizen defendants have been served in the underlying state cause of action, attaching copies of returns of service of summons as needed. Plaintiff shall file this brief with the Court via ECF on or before **November 24, 2004**. Defendant Waugh shall file his response to this brief on or before **December 2, 2004**.

IT IS SO ORDERED

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: _November 17, 2004_
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SAINT JOSEPH DIVISION

THOMAS A. HORTON Plaintiff	)	
vs.	)	CASE NO. 4:04-cv-1002
KATHERINE A. CONKLIN, et al Defendants	)	

BRIEF

Defendant Steven T. Waugh hereby files this Brief in response to the Court's order of November 17, 2004, and in response to Plaintiff Thomas A. Horton's Brief dated November 22, 2004.

Defendant Steven T. Waugh understands the court's inquiry to question whether this case was properly removable under 28 U.S.C. 1441(b) when some of the named defendants are citizens of Missouri and when not all of the defendants joined in the removal. However, the remaining defendants were not required to join in the removal because (1) they were merely nominal or formal parties and because (2) they did not respond to the Complaint in any way.

The law is clear that nominal or formal parties, being neither necessary nor indispensable, are not required to join in the petition for removal. Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assistants' Local 349, etc., 427 F.2d 325, 327 (5th Cir. 1970) That court noted two formulations of the test of whether a named defendant is a

nominal party or not. The first formulation of the test is if "his role in the law suit is that of a depositary or stakeholder . . . ". Id at 327, citing Colman v. Shimer, 163 F. Supp. 347 (W. D. Mich. 1958). The second formulation of the test is whether "in the absence of the [defendant], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff." Id at 327, citing Stonybrook Tenants Association, Inc. v. Alpert, 194 F.Supp 552, 559 (D. Conn., 1961).

In his November 22, 2004, brief, Plaintiff Thomas A. Horton indicates that Lee Graber and Sylvia Graber as well as St. Phillips Episcopal Church, all residents of Missouri, were served on September 28, 2004. According to the web site maintained by the State of Missouri, Office of the State Courts Administrator, other than defendant Steven T. Waugh, all of the named defendants that were served were served on or before October 1, 2004. Defendant Steven T. Waugh was served on October 4, 2004. Missouri state law requires an answer to be filed within 30 days of service. By November 2, 2004, when the Notice of Removal had been filed, none of the other defendants had responded to the complaint in any way. Accordingly, they had all defaulted as of November 1, 2004, and were no longer properly considered to be defendants. As a result, this Court can enter a final judgment in the absence of the other defendants that is consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff

Because the other defendants all defaulted, they are properly considered to be nominal or formal defendants. As such, they need not have joined in the removal and

need not be considered as defendants when applying 28 U.S.C. 1441.

Contemporaneously with this brief, Defendant Steven Waugh is filing a motion requesting the court to dismiss from this action all the parties that have not filed answers.

Dated: December 2, 2004

Respectfully submitted,

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Supreme Court, U.S.
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(2)

No. 05-1419

IN THE

Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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August, 2006

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Steven T. Waugh submits this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Ninth Circuit in *Lively* v. *Wild Oats Markets, Inc.*, 2006 U.S. App. LEXIS 18793 (9th Cir. July 27, 2006).

The Ninth Circuit's opinion in *Lively* conflicts with the Eighth Circuit's decision in this case on the precise question presented for review. The Ninth Circuit thus joins the First, Second, Third, Fifth, Sixth, and Seventh Circuits, which all have held that the presence of a forum-state defendant is not a jurisdictional defect, and thus is waived if not raised by motion within 30 days of the notice of removal. *See* Pet. 10-14.

Lively is a personal injury action in which the plaintiff claims damages due to a slip-and-fall accident in the defendant's store. 2006 U.S. App. LEXIS 18793, at *6. As here, the defendant removed the action to federal court because there was complete diversity and the amount in controversy exceeded $75,000. *Id.* at *1. And as here, the plaintiff did not object to the removal, but the district court *sua sponte* "determined that diversity jurisdiction did not exist because [defendant], contrary to the removal requirement of 28 U.S.C. § 1441(b), was a citizen of" the forum state. *Id.* at *2. The district court "treated this requirement as a jurisdictional limitation," and remanded the case to state court. *Id.*

The Ninth Circuit disagreed and vacated the district court's remand order. The court held that "the forum defendant rule is procedural, and therefore a violation of this rule is a waivable defect in the removal process that cannot form the basis for a district court's *sua sponte* remand order." *Id.* at *4 (footnote omitted). The court further held that "28 U.S.C. § 1447(d) does not bar appellate review of the district court's remand order,

which was based on [defendant's] violation of the forum defendant rule." *Id.*

With regard to its jurisdiction to hear the appeal, the court stated that "although [28 U.S.C.] § 1447(d) limits appellate review of district court remand orders, this does not mean that we must simply turn this case away because the district court asserted that it lacked jurisdiction." *Id.* at *8. Instead, the court stated that it "must determine whether the district court correctly applied § 1447(c) by deciding that the forum defendant rule is a jurisdictional limitation that may be invoked *sua sponte*," and that the answer to this question would determine the court's own jurisdiction, which the court has jurisdiction to decide. *Id.* at *7-*8.

Turning to the substance of the appeal, the court held that the forum defendant rule is an "additional limitation on diversity-based removal" that is "a procedural, or nonjurisdictional, rule." *Id.* at *13. The court traced the history of the § 1447(c), noting that as originally written, the statute allowed a district court to remand if the case was removed "'improvidently and without jurisdiction.'" *Id.* at *14, quoting 28 U.S.C. § 1447(c) (1948). The court observed that the statute was revised in 1988 to reflect that "any defect in the removal process" must be raised by motion within 30 days, while lack of jurisdiction required remand at any time before final judgment. *Id.* The court then looked to the 1996 revision to § 1447(c), which changed "defect in the removal process" to "any defect other than lack of subject matter jurisdiction." *Id.* at *15. The court quoted the Eleventh Circuit's statement that this revision "would seem to address neatly" the divergent interpretations of § 1441(c) "that had troubled the courts under the 1988 version, suggesting that removal in violation of § 1441(b) is subject to the 30-day time limit." *Id.*, quoting *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999).

The court then looked to the "purpose of the forum defendant rule." *Id.* at *16. The court stated that removal in a diversity case is "intended to protect out-of-state defendants from possible prejudices in state court," but that this protection is unnecessary when the defendant is a citizen of the forum state. *Id.* The forum defendant rule thus "allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court." *Id.* The court reasoned that the rule is procedural because the plaintiff may choose to move to remand or not, and "[e]ither way, the plaintiff exercises control over the forum." *Id.* at *17.

The Ninth Circuit's opinion also noted the split among the circuits, and stated that "the Eighth Circuit is the sole circuit on the jurisdictional side" of the question. *Id.* at *17-*18.[1] The court examined the Eighth Circuit's decision in *Hurt* v. *Dow Chemical Co.*, but "like the courts that have considered *Hurt*," it "reject[ed] the Eighth Circuit's approach." *Id.* at *19-*20. "In sum," the court held, "the legislative history of § 1447(c), the policy rationale of § 1441(b), the result reached by the 'overwhelming' majority of our sister circuits, and Supreme Court precedent compel our holding" that the forum defendant rule is not jurisdictional.

---

[1] The Ninth Circuit stated that its interpretation "comports with eight of the nine circuits that have addressed this issue." 2006 U.S. App. LEXIS 18793, at *17. In addition to the circuits listed in the petition, the court included the Tenth and Eleventh Circuits among those who have found the forum defendant rule to be nonjurisdictional. Petitioner agrees that the Eleventh Circuit would rule this way, but it has not had an opportunity to do so since *Snapper*. Similarly, while the Tenth Circuit's decision in *Am. Oil Co.* v. *McMullin*, 433 F.2d 1091 (10th Cir. 1970), described the forum defendant rule as a "technical" violation, Petitioner has not located a case in which that court directly held that the rule is nonjurisdictional.

The Ninth Circuit's opinion in *Lively* further exacerbates the circuit split identified in the petition for certiorari. The question has been broadly considered by the courts of appeals, which have overwhelmingly adopted the interpretation contrary to the Eighth Circuit's opinion in this case. The Eighth Circuit has declined to reconsider its position *en banc*, and the split is therefore likely to persist without a decision from the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Circuits Are Squarely Split Over Whether A Violation Of The Forum Defendant Rule Is Jurisdictional. 1

II. This Case Provides An Appropriate Vehicle For Resolving The Split 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

American Fire & Cas. Co. v. *Finn*, 341 U.S. 6 (1951) 2
Bregman v. *Alderman*, 955 F.2d 660 (11th Cir. 1992) 4
Caterpillar, Inc. v. *Lewis*, 519 U.S. 61 (1996) 2
Dellinger v. *Atlas Techs., Inc.*, No. 92-2091,
1993 U.S. App. LEXIS 23813 (6th Cir. 1993) 5
Farm Construction Services, Inc. v. *Fudge*,
831 F.2d 18 (1st Cir. 1987) 2
Grubbs v. *General Elec. Credit Corp.*,
05 U.S. 699 (1972) 6
Guaranty Nat'l Title Co. v. *J.E.G. Assocs.*,
101 F.3d 57 (7th Cir. 1996) 9
Handley-Mack Co. v. *Godchaux Sugar Co.*,
2 F.2d 435 (6th Cir. 1924) 4
Hurley v. *Motor Coach Indus., Inc.*,
222 F.3d 377 (7th Cir. 2000) 2
Hurt v. *Dow Chemical Co.*,
963 F.2d 1142 (8th Cir. 1992) 3
In re Shell Oil Co.,
932 F.2d 1518 (5th Cir. 1991) 4
Johnson v. *Columbia Props. Anchorage, LP*,
437 F.3d 894 (9th Cir. 2006) 8
Kircher v. *Putnam Foods Trust*, 547 U.S. ___ (2006) 7
Korea Exchange Bank v. *Trackwise*
Sales Corp., 66 F.3d 46 (3d Cir. 1995) 3
Lenon v. *St. Paul Mercury Ins. Co.*,
136 F.3d 1365 (10th Cir. 1998) 8
Lincoln Prop. Co. v. *Roche*,
126 S. Ct. 606 (2005) 6
Local Union 598 v. *J.A. Jones Constr. Co.*,
846 F.2d 1213 (9th Cir. 1988) 5
Marathon Oil Co. v. *Ruhrgas*,
145 F.3d 211 (5th Cir. 1998) 4
Navarro Savings Ass'n v. *Lee*, 446 U.S. 458 (1980) 1, 8

Russell Corp. v. *Am. Home Assur. Co.*,
264 F.3d 1040 (11th Cir. 2001) 7
Shapiro v. *Logistec USA Inc.*,
412 F.3d 307 (2d Cir. 2005) 3, 7
Snapper, Inc. v. *Redan*,
171 F.3d 1249 (11th Cir. 1999) 5
United Investors Life Ins. Co. v. *Waddell & Reed, Inc.*,
360 F.3d 960 (9th Cir. 2004) 7

STATUTES

28 U.S.C. § 1441 3
28 U.S.C. § 1447 ..... 3, 4, 5, 6
Mo. Rev. Stat. Ann. § 456.8-815 8

OTHER

Sixth Cir. R. 28 5
Wright & Miller, Federal Practice & Procedure
(1990 & Supp. 2005) 8

REPLY BRIEF FOR PETITIONER

Respondent acknowledges that the courts of appeals have adopted "differing interpretations" of whether a violation of the forum defendant rule of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand or instead a nonjurisdictional defect that must be raised by motion within 30 days of removal. Br. in Opp. 26. The Eighth Circuit holds that the rule is jurisdictional, while six other circuits have held that it is not, and a seventh has so stated in dicta.

The split among the circuits is squarely presented in this case; the majority position is well established and the Eighth Circuit has declined to reconsider its contrary holding. This case provides an appropriate vehicle for resolving the split: There is complete diversity here because even if Respondent is properly considered a trustee in this case (which he is not), a trustee's own citizenship is counted for diversity purposes, not that of the trustors or the beneficiaries. *See Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 (1980). There is no dispute that Respondent is a citizen of Maine and no defendant is a citizen of that State.

I. The Circuits Are Squarely Split Over Whether A Violation Of The Forum Defendant Rule Is Jurisdictional.

As described in the Petition (pp. 10-16), six of the seven circuits to decide the question have held that the forum defendant rule is nonjurisdictional, and is thus waived if the adverse party fails to file a timely motion for remand under 28 U.S.C. § 1447(c). In addition, the Eleventh Circuit has stated (but not held) that the presence of an in-state defendant is a nonjurisdictional defect that must be raised within 30 days of removal. Only the Eighth Circuit has adopted the contrary position

that the presence of an in-state defendant divests the district court of subject matter jurisdiction.

Respondent's efforts to distinguish the decisions of other circuits are unpersuasive. To begin with, Respondent does not attempt to distinguish the Seventh Circuit's decision in *Hurley* v. *Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000), acknowledging that it is perhaps "the seminal case in establishing the forum defendant rule as a procedural defect." Br. in Opp. at 12. Instead, Respondent distinguishes a decision of this Court upon which the Seventh Circuit relied, *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996) (holding lack of diversity at time of removal did not require dismissal where all claims concerning nondiverse defendant were settled before trial). Whether *Caterpillar* is properly distinguished from the instant case is irrelevant to the split in authority among the circuits over the question presented.

Next, Respondent tries to distinguish the First Circuit's decision in *Farm Construction Services, Inc.* v. *Fudge*, 831 F.2d 18 (1st Cir. 1987), on the ground that in *Farm Construction* the plaintiff did not object to removal, while here the district court raised the forum defendant rule on its own motion and the plaintiff verified that a forum-state defendant was served in the case. Br. in Opp. at 14. Rather than serving to distinguish the First Circuit, the difference between *Farm Construction* and this case illustrates the circuit split at issue: If the Eighth Circuit is correct that a violation of the forum defendant rule divests the district court of jurisdiction, then the district court was right to raise the issue on its own motion, and plaintiff's verification that there was an in-state defendant was a sufficient basis upon which to remand this case. Moreover, if the Eighth Circuit is correct, *Farm Construction* was wrongly decided, because failure to object to removal cannot cure a jurisdictional defect. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 18

(1951) ("It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.").

If, on the other hand, the presence of an in-state defendant is a defect in the removal process "other than lack of subject matter jurisdiction," it must be raised by a motion to remand "within 30 days after the filing of a notice of removal." 28 U.S.C. § 1447(c). Here, as in *Farm Construction*, the plaintiff (Respondent) did not object to removal within 30 days. If the forum defendant rule is nonjurisdictional, *Farm Construction* was correctly decided and this case was not.

Respondent's only basis for distinguishing the Second Circuit's decisions holding that the forum defendant rule is nonjurisdictional appears to be that one of the cases involved a mortgage foreclosure. Br. in Opp. at 14. But the Second Circuit recently reaffirmed (in a wrongful death case) that "section 1441(b)'s rule against removal where a defendant is a citizen of the forum was a procedural rule and was not jurisdictional." *Shapiro* v. *Logistec USA Inc.*, 412 F.3d 307, 313 (2d Cir. 2005). In so holding, the Second Circuit expressly noted its disagreement with the Eighth Circuit's holding in *Hurt* v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992). *Shapiro*, 412 F.3d at 313 n.2.

Nor is the Third Circuit's decision in *Korea Exchange Bank* v. *Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1993), distinguishable. Respondent notes that in *Korea Exchange* the forum-state defendant removed the case. Section 1441 of title 28 does not distinguish between the forum-state defendant and other defendants. *See* 28 U.S.C. § 1441(b). Thus, the answer to the question whether the forum defendant rule is jurisdictional cannot turn on whether the removing defendant is the forum-state defendant or another defendant.

Respondent's attempt to distinguish the Fifth Circuit's cases is similarly unavailing. In *In re Shell Oil Co.*, that court expressly stated that the presence of a forum-state defendant is "a waivable removal defect" rather than a requirement of federal jurisdiction. 932 F.2d 1518, 1523 (5th Cir. 1991). The Fifth Circuit has continued to follow *Shell*. *E.g.*, *Marathon Oil Co.* v. *Ruhrgas*, 145 F.3d 211, 221 (5th Cir. 1998) ("[R]emoval by an in-state defendant in diversity cases . . . is waivable if not timely asserted by the plaintiff.").[1]

Respondent does not deny that the Sixth Circuit has held that a plaintiff's failure to timely challenge removal because of the presence of a forum-state defendant indicated consent to the federal forum. Br. in Opp. at 11, citing *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435, 436 (6th Cir. 1924). Respondent notes that the plaintiff in *Handley-Mack* did not contest the removal until after a judgment was issued, but that is not a sufficient basis to distinguish the case. Under the current statute, however, "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." 28 U.S.C. § 1447(c). A plaintiff thus waives his objection to removal by failing to move to remand within 30 days; whether he objects on the

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[1] *Bregman* v. *Alderman*, identified by Respondent as a Fifth Circuit case. Br. in Opp. at 16, is actually an Eleventh Circuit case, and moreover is consistent with *Shell*. 955 F.2d 660 (11th Cir. 1992). In *Bregman*, the court confirmed that "removal "pursuant to § 1441(b)" where "two of the defendants were citizens of the forum state" is "a defect in removal procedure," and that "district court still had subject matter jurisdiction because there was complete diversity between the parties." *Id.* at 663-64.

31st day or after judgment is immaterial for purposes of section 1447.[2]

Finally, as noted in the Petition (p. 16), the Eleventh Circuit has not directly decided whether a violation of the forum defendant rule is jurisdictional, but has indicated its view that "removal in violation of 1441(b) is subject to the 30-day time limit" of section 1447(c). *Snapper* v. *Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999). The 30-day time limit applies only to "a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c).[3]

The circuits are thus intractably split, seven circuits to one, on the question of whether the absence of

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[2] Respondent characterizes the Sixth Circuit as "by no means decided" on the question presented, but cites only a single unpublished decision for support. Br. in Opp. at 11, citing *Dellinger* v. *Atlas Techs., Inc.*, No. 92-2091, 1993 U.S. App. LEXIS 23813 (6th Cir. 1993) (unpublished). In *Dellinger*, however, the plaintiff "timely objected to removal." 1993 U.S. App. LEXIS at *3. *See also* Sixth Cir. R. 28(g) (citation to unpublished opinions is "disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.").

[3] Respondent contends that the Ninth Circuit holds that the forum defendant rule is jurisdictional, citing *Local Union 598* v. *J.A. Jones Constr. Co.*, 846 F.2d 1213, 1215 (9th Cir. 1988). *Local Union* does not clearly fall on either side of the circuit split. In that case, one defendant was both a citizen of the forum state and not diverse from the plaintiff. *Id.* The plaintiff voluntarily dismissed the nondiverse defendant and did not object to jurisdiction before judgment. *Id.* The court concluded that the judgment "may be upheld even if there was no right to removal" in such a circumstance. *Id.* at 1215-16, quoting *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972). Of course, even if Respondent were correct that the Ninth Circuit holds the forum defendant rule to be jurisdictional, it would only widen the circuit split.

a forum defendant is a requirement of federal jurisdiction in a removed case or a "defect other than lack of subject matter jurisdiction" which must be raised by motion within 30 days of removal or be waived. *Id.* Respondent acknowledges that there are "varying interpretations between the circuits," and has not articulated any colorable argument that the split is any less deep or entrenched than described in the Petition. Br. in Opp. at 16. The split has also been noted and considered by numerous courts and commentators, so further consideration is unlikely to shed additional light on the issue. *See* Pet. at 9 (collecting authorities). The Eighth Circuit has declined to consider its precedent *en banc*. Pet. App. 8a. Instead, the court left intact the panel decision declaring that its contrarian precedent "sets forth the better rule." Pet. App. 4a. The circuits are therefore likely to remain split over the scope of federal jurisdiction unless this Court resolves the issue.

II. This Case Provides An Appropriate Vehicle For Resolving The Split.

This case provides an appropriate vehicle for the Court to determine whether the forum defendant rule is jurisdictional. Petitioner timely removed the case from state court on the basis of federal diversity jurisdiction. The district court raised the presence of a forum defendant on its own motion, and remanded the case on its own motion after determining that a forum defendant was served. Pet. App. 10a; Br. in Opp. App. 1a-2a. Respondent declined to move to remand the case, instead filing an answer asking the court to "proceed to adjudication" on the merits of the case. Pl.'s Reply & Answer at 3.[1] The sole basis for remand was therefore

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[1] Respondent asserts that any reliance on this statement would be "specious," Br. in Opp. at 25, but does not explain why this (...continued)

the district court's adherence to Eighth Circuit precedent holding the forum defendant rule to be jurisdictional.

Respondent argues that because the district court believed that the presence of a forum defendant divested it of jurisdiction, the remand order is one that is "based on lack of subject matter jurisdiction," and therefore unreviewable under 28 U.S.C. § 1447(d). But this Court recently rejected the proposition that it may not look beyond the label given to a remand order by the district court. *See Kircher* v. *Putnam Foods Trust*, 547 U.S. ___, slip op. at 7 n.9 (2006). The courts of appeals have likewise held that in determining whether a remand order is based on grounds specified in § 1447(c), a reviewing court must look to "what the district court did—not what it said." *Shapiro* v. *Logistec USA Inc.*, 412 F.3d 307, 311 (2d Cir. 2005). The court "may therefore conclude that the basis for the remand was not a section 1447(c) ground even though the district court made statements that seem to suggest otherwise." *Id.*; *see also, e.g., United Investors Life Ins. Co.* v. *Waddell & Reed, Inc.*, 360 F.3d 960, 964 (9th Cir. 2004) ("[W]e examine the full record before the district court to ascertain the court's 'actual reason' for remanding."); *Russell Corp.* v. *Am. Home Assur. Co.*, 264 F.3d 1040, 1046 n.3 (11th Cir. 2001) ("In determining the basis for a remand order, we examine not only the district court's stated reasons, but also the substance of the order.").

Here, the district court's order unquestionably was based on the presence of a defendant in the forum state. The Eighth Circuit views this as a jurisdictional defect, while the rest of the circuits that have decided this question have found that it is not jurisdictional. A

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is so. Parties generally are held to statements in their pleadings.

district court cannot usurp this Court's role in policing the uniformity of federal law simply by using "magic words," *i.e.*, "lack of jurisdiction."

Moreover, there is complete diversity in this case. It is undisputed that Respondent is a citizen of Maine,[5] and that no defendant is a citizen of Maine. For the first time in this case, Respondent contends that he should be treated as the trustee of the disputed trust in the underlying dispute and therefore as a citizen of Missouri, the state where the trustors were residents.

This argument fails for the simple reason that, as this Court has held, "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 (1980). Missouri trustees have all of these powers. Mo. Rev. Stat. Ann. § 456.8-815. "The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists." 6A Wright & Miller, Federal Practice & Procedure 2d § 1556 (1990 & Supp. 2005). Thus, even if Respondent is considered the trustee of the disputed trust at issue in this case, his own citizenship is determinative for purposes of diversity jurisdiction. *Accord, e.g.*, *Johnson* v. *Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *Lenon* v. *St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998) (holding that "the district court correctly looked to the citizenship of the trustees for diversity purposes"); *Guaranty Nat'l Title Co.* v. *J.E.G. Assocs.*, 101 F.3d 57, 59

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[5] The first sentence of the complaint filed by Respondent in the state court alleges, "Plaintiff is a resident of Brunswick, Maine." Pet. to Construe Trust at 1; *see also* Pet. App. 2a.

(7th Cir. 1996) ("For purposes of § 1332, the citizenship of a trust is the citizenship of its trustee.").[6]

Finally, Respondent's arguments that the Eighth Circuit's ruling is independently justified under the "rule of unanimity" and that there was no need to file a motion to remand must fail. Br. in Opp. at 23-25. As noted in the Petition, the circuits agree that failure of all defendants to join a notice of removal is a procedural defect in the removal process. *See* Pet. at 18-19. Procedural defects must be raised by a motion to remand within 30 days or else be waived; a court may not remand on a procedural ground *sua sponte*. 28 U.S.C. § 1447(c); *see also* Pet. at 19-20 (collecting cases). Respondent admits that he did not file a motion to remand on any ground. Br. in Opp. at 5. Consequently, Respondent waived an objection based on the rule of unanimity by failing to move for remand. Moreover, if the forum defendant rule is nonjurisdictional, Respondent was required to raise that issue by a motion to remand to avoid waiving it.[7]

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[6] Whether Respondent is the proper trustee in this case has not been determined. Respondent filed this case in order to construe the underlying trust; the identity of the trustee depends on the outcome of the case on the merits.

[7] Petitioner's counsel regrets that counsel for Respondent did not receive service copies of the Petition. *See* Br. in Opp. at 4 n.1. As best as Petitioner's counsel can determine, service copies were sent to Respondent's counsel on May 9, 2006, via first-class mail, at the address shown on the certificate of service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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